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The Law Journal of the Scottish Universities

1959

Edinburgh
W. GREEN AND SON LIMITED
Law Publishers

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JURIDICAL REVIEW

THE PURPOSE OF MANDAMUS IN ENGLISH LAW

MANDAMUS is a great supervisory safeguard in English law. Through its agency the High Court is able to compel inferior courts and tribunals to carry out certain duties. Yet, despite the almost boundless potentialities of such a remedy, it is not often clearly understood how wide or how limited is the power of mandamus. The purpose of this article is to explore this problem in detail, and to attempt to elucidate the principles which govern the issue of the remedy.

Mandamus is the one positive prerogative order[1] provided by the law of England,[2] and the consequences of its issue depend upon the circumstances in which it may successfully be sought.[3] It was defined in 1762[4] as " . . . a writ issuing out of the Court of King's Bench, sent by the King to the head of some corporation, commanding them to admit or restore a person into his place or office." Blackstone's *Commentaries*[5] give a fuller, and most useful, description: " A writ of mandamus is, in general, a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposed to be consonant to right and justice. It is a high prerogative writ, of a most extensive remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office: but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance." It is quite certain from the definitions available in the eighteenth and nineteenth centuries that the jurists were agreed that mandamus was a prerogative writ introduced to prevent disorder from a failure of justice and defect of policy, to be employed wherever the law had established no specific remedy, and commanding the person or body to which it was directed to do some particular thing appertaining to their office or duty.[6] A generally accepted definition at the present day, perhaps, is that of Holdsworth.[7] He quotes part of the passage from Blackstone mentioned above, and goes on to state that mandamus lies, for instance, to compel the admission or restoration of any person to a public office, or to compel the holding of a court. Further, the ultimate penalty for failure to obey the order is attachment.[8]

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[1] The other two prerogative orders, certiorari and prohibition, being negative in nature.

[2] The old prerogative writ of mandamus, along with the old writs of certiorari and prohibition, was abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7, and the new prerogative order was substituted; but the change was only one of procedure, not substance.

[3] As will be explained in the course of this article. The Report of the Committee on Administrative Tribunals and Enquiries states, at para. 117: " . . . we are convinced the remedies by way of orders of certiorari, prohibition and mandamus should continue."

[4] Jacob, *Law Dictionary* (8th ed., 1762), " Mandamus "; see also Hawkins, *Pleas of the Crown* (1762), Book II, Chap. 10, s. 47.

[5] Book III, p. 110; similarly described in Bacon's *Abridgment* (3rd ed., 1768), " Mandamus " (A), (C).

Valuable work has been done by Mr. S. A. de Smith[9] in tracing the way in which the form and purpose of mandamus came to be settled in the manner indicated by the definitions. He has shown that the first reported case of a mandamus serving purposes substantially similar to those of the modern writ or order was in 1573.[10] The " well-head " of the modern mandamus was, however, *Bagg's Case*.[11] In that case the writ issued out of the King's Bench, and was attested by Chief Justice Coke. Bagg, a capital burgess of Plymouth, had been unjustly removed from his office by the mayor and commonalty, and the writ commanded them to restore him, unless they showed to the court good cause for their conduct; and, since they failed to satisfy the court, a peremptory mandamus issued to restore Bagg. Coke had taken the King's prerogative into his own hand, and had used it against a recalcitrant body professing to act under a Crown Charter.

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[6] See Comyns' *Digest* (5th ed., 1822), "Mandamus" (A); also the American definition contained in Bouvier, *Law Dictionary* (Raule ed., 1898), "Mandamus."

[7] *History of English Law*, Vol. I (7th ed., revised), p. 229; see also Allen, *Law and Orders* (2nd ed., 1956), pp. 249–253.

[8] Crown Office Rules, 1906, rules 240–242; *R.* v. *Powell* (1841) 1 Q.B. 352, 361; *R.* v. *Worcester Corporation* (1904) 68 J.P. 130; (1905) 69 J.P. 296; Bl.Comm., p. 111; *R.* v. *Severn and Wye Ry.* (1819) 2 B. & Ald. 646, 652; *R.* v. *Poole Corporation* (1843) 1 Gal. & Dav. 728. If, on the other hand, it can be shown that the mandamus is bad, no attachment can go: *R.* v. *Ledgard* (1841) 1 Q.B. 616. Attachment will not go to a whole corporation, but if it should be so addressed it is considered to be a command addressed to every individual member of the corporation: *R.* v. *Poplar Borough Council* (*No.* 2) [1922] 1 K.B. 95.

[9] "The Prerogative Writs" (1951) 11 Camb.L.J. 40, 50.

The great Lord Holt, as Jenks and Mr. de Smith have pointed out in articles published respectively in 1923 and 1951,[12] carried on the work of Coke, and framed the scope of mandamus along the lines since followed. In *Parkinson's Case*[13] he enunciated that the writ was applicable only to " something concerning the publick," and refused to allow it to be used to restore a Fellow of a College.[14] " The true reason of mandamus," he said in a case of 1701,[15] " was when aldermen, capital burgesses, or such other officers concerning the administration of justice, were kept out, to swear them into, or at least restore them into, their places, . . . and it is rare to grant it when one has any other remedy." But it was Holt who was largely responsible for developing the writ in such a way that it became more comprehensive than a mere writ of restitution.[16] It would go to compel the performance of duties of a public nature, where such performance had been wrongfully refused. It issued, for example, to compel the admission, as well as the restoration, of an alderman to a corporation,[17] and to compel the holding of an election to the office[18]; and when corporations, at the time of Charles II and James II, were unlawfully packed by the Tories to exclude Whig candidates from municipal office, the latter countered with writs of mandamus.[19] In *R.* v. *Barker*[20] Lord Mansfield says that a mandamus ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one; and he goes on to recite that writs had been granted to admit lecturers, clerks, sextons and scavengers, and to restore an alderman to precedency and an attorney to practice in an inferior court.

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[10] *Middleton's Case*, 3 Dyer 332b, in which it was issued to restore a citizen of London to his franchise, of which he had been illegally deprived.

[11] (1615) 11 Co.Rep. 93b. It was so recognised as the " well-head " of the modern form and purpose of mandamus by Powys J. in *R.* v. *Heathcote* (1713) 10 Mod. 48, 57. See also Jenks, " The Prerogative Writs in English Law " (1923) 32 Yale L.J. 523, at pp. 529–531; de Smith, *op. cit.*, p. 50; also Jeffe and Henderson, " Judicial Review and the Rule of Law: Historical Origins " (1956) 72 L.Q.R. 345, 359.

[12] Jenks, *loc. cit.*; de Smith, *loc. cit.*

[13] (1689) Holt 142, 143; see also *R.* v. *Oxenden* (1691) Holt 435.

[14] This type of case will be discussed later.

[15] *Case of Andover*, Holt 441.

[16] See de Smith, *op. cit.*

One of the most important developments at this period was the establishment of the rule that the writ would issue to inferior tribunals that declined jurisdiction[21]; ministerial duties binding upon both administrative and judicial bodies could be enforced by the writ of mandamus. Thus by the 1760s the course of mandamus was set upon the road of modern development and usage of the writ two hundred years ago is easily identifiable with that of its modern descendant.[22]

Although mandamus was in early times a royal mandate issued for diverse purposes of government,[23] it was not till the end of the seventeenth century that it was first termed a "prerogative writ." There was an inference in *Bagg's*

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[17] *R.* v. *Mayor of Norwich* (1707) 2 Ld.Raym. 1244.

[18] *R.* v. *Mayor of Evesham* (1733) 7 Mod. 166.

[19] This was alluded to in Lord Mansfield's judgment in *R.* v. *Barker* (1762) 1 Bl.W. 352; 3 Burr. 1265, 1267. Jenks, *op. cit.*, says that the Tories were attempting to exclude the Whig candidates despite the Toleration Act, but, as Mr. de Smith rightly points out, *op. cit.*, at p. 51, that Act had nothing whatsoever to do with corporate office.

[20] *Supra.*

[21] *e.g.*, see *Groenvelt* v. *Burwell* (1699) 1 Ld.Raym. 454 at p. 469.

[22] See *R.* v. *Blooer* (1760) 2 Burr. 1043; *R.* v. *Barker, supra*; *R.* v. *Askew* (1768) 4 Burr. 2186; de Smith, *op. cit.*, p. 51.

[23] de Smith, *op. cit.*, pp. 41 and 50.

Case that the writ was of a prerogative nature,[24] but *Knipe* v. *Edwin*[25] was the first case in which it was actually mentioned as such. Lord Mansfield, however, finally characterised the modern mandamus by referring to it several times in his judgments as a "prerogative writ."[26]

It has been generally agreed by jurists that mandamus has always issued from the King's Bench,[27] but a question not adequately considered by them is whether this was the only court from which the writ would issue.[28] There was a similar writ *de procedendo ad judicium* issuing out of the Chancery and ordering the judges of any court to proceed to judgment,[29] but this was not merely another form of mandamus: it was a totally different writ. It is, however, possible that mandamus may have issued out of the Chancery, though there is little authority to support such a view. A case of 1683[30] showed that such a writ had issued out of Chancery to an inferior court (here the Sheriff's Court in London), and Bacon's *Abridgment*[31] states that, though mandamus usually issues from the King's Bench, yet it may possibly issue out of Chancery. On the other hand mandamus only lies in respect of a legal right, and the court will not enforce an equitable right by this remedy.[32] No other authority appears to be of much help, although the report of a case shortly after the Judicature Act, 1873,[33] seems to suggest that the jurisdiction to issue mandamus ought only to be exercised by the Queen's Bench Division, notwithstanding section 25 of that Act. James L.J. asserted that the Court of Chancery had never granted a mandamus to a public body to compel it to do things for the benefit of private persons who might have benefited thereby. The question whether or not mandamus could ever have issued from Chancery is now, perhaps, only of academic importance, but surely the inference of James L.J. must have been wrong. At all events the hearing of a case of 1908 actually took place in the Chancery Division.[34]

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[24] (1615) 11 Co.Rep. 93b.

[25] (1694) 4 Mod. 281.

[26] *R.* v. *Cowle* (1759) 2 Burr. 834, 855; *R.* v. *Barker, supra*; *R.* v. *University of Cambridge* (1765) 3 Burr. 1647, 1659; *Dr. Askew's Case, supra.*

[27] See the definitions of mandamus, *supra.*

[28] Even Mr. de Smith in his *Cambridge Law Journal* article does not consider further than to say that the writ issued out of the King's Bench.

[29] Fitzherbert, *Natura Brevium*, p. 153B; Bl.Comm., Bk. III, p. 109 (where the writ is called merely *procedendo* or *procedendo ad judicium*).

[30] *The Rioters' Case* (1683) 1 Vern. 175.

[31] "Mandamus" (E).

[32] *R.* v. *Marquis of Stafford* (1790) 3 T.R. 646, 651; *Ex p. Napier* (1852) 18 Q.B. 692, 695; *Morgan* v. *Metropolitan Ry.* (1868) L.R. 4 C.P. 97, 101.

[33] *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch.D. 102, 115.

The Grounds for Mandamus

I. *Wrongful Exclusion from Office*

Lord Holt and Lord Mansfield were, as has been seen, prepared to extend the scope of mandamus to cover the case of a man wrongfully excluded from office, and the classes of persons whose tenure of office was becoming protected in this way were gradually increasing in size. Even in the seventeenth century the Dean and Chapter of Westminster were compelled, by means of a mandamus, to admit a man to the office of bailiff there, upon the nomination of the Duke of Ormond, who was High Steward,[35] and in the eighteenth century mandamus was commonly employed as a remedy where there had been a wrongful expulsion from any public office[36]: no examples can be found of the writ issuing to compel the admission or restoration of a person to a private office. As Lord Holt had said, the writ was applicable only to "something concerning the publick,"[37] and there is a line of cases deciding that a mandamus would not lie to admit or restore anyone to the Fellowship of a College, for such an office is not a public one,[38] although that is not the only reason for those decisions: College statutes provide that an appeal to the Visitor (where the College has a Visitor) is the absolute remedy in such a case, the Visitor's decision being final,[39] and the law will not interfere in any other way, except possibly by injunction.

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[34] *Croydon Corporation* v. *Croydon R. D. C.* [1908] 2 Ch. 321 (see a note by the author, 18 M.L.R. 493).

[35] *Knipe* v. *Edwin* (1694) 4 Mod. 281.

[36] Bacon's *Abridgment*, "Mandamus" (C); Comyns' *Digest*, "Mandamus" (A), (B).

[37] *Parkinson's Case, supra.*

[38] *Parkinson's Case, supra*; *Ex p. Buller* (1855) 1 Jur. 709; *R.* v. *Hertford College* (1878) 3 Q.B.D. 693. See also *R.* v. *Oxenden* (1691) Holt 435, where a mandamus was refused where it was sought to compel the restoration of a proctor to office.

An important modification of the law was, however, made clear in the case of *R.* v. *Jotham* in 1790.[40] The matter was succinctly stated by Buller J. at page 577 of the report, where he asserts that a great deal of difference can be drawn between a mandamus to compel an admission and one to compel a restoration. He goes on to explain this:

> "The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a prima facie title: for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits."

Perhaps the reasons for the distinction given by Buller J. are not perfectly perspicuous, but the fact of the decision remains; and so, apparently, although a mandamus to compel admission to an office may be obtained in order to try a doubtful right of admission, yet a mandamus to restore would only be granted in a much narrower type of case. It does seem, however, that even a mandamus to admit would not be issued where the office was not a public office, for the line of cases we have mentioned above on this subject[41] extends to a much later date than 1790, and, in fact, a case[42] four years later than *R.* v. *Jotham* was reported in which a mandamus to admit a vestry clerk was refused because the office was of a private nature. Lord Kenyon C.J. said emphatically[43] that "if a mandamus were to be granted to restore[44] to the office of a vestry clerk, I should soon expect to hear of an application for a mandamus to restore to the office of a toll-gate keeper of a turn-pike road."

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[39] See the recent case of *R.* v. *Dunsheath, ex p. Meredith* [1951] 1 K.B. 127; also Bacon's *Abridgment*, "Mandamus" (C).

[40] 3 T.R. 574.

[41] Note especially *R.* v. *Hertford College, supra*, in which a mandamus would not go to Hertford College, Oxford, to compel them to *admit* a certain person to a Fellowship.

[42] *R.* v. *Croydon Churchwardens* (1794) 5 T.R. 713.

[43] *Ibid.*, at p. 714.

The actual facts in *R.* v. *Jotham* were a little unusual. The minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, and a mandamus to restore him was applied for so as to enable him to justify the conduct which had led to his expulsion. But the court refused to allow the writ to issue, because it did not appear that he had complied with all the requisites necessary to give him a prima facie title. It was not enough, as Ashhurst J. pointed out,[45] for the complainant to state his supposition that he was elected for life; he ought to have shown the grounds for it.

A later example of the same principle may be seen where the writ was refused to restore a person to the secretaryship of a society, for the office was a precarious one depending on the will of a fluctuating body. The applicant's tenure of office was not therefore secure, and a mandamus was not a suitable remedy.[46] On the other hand a mandamus would always issue in a proper case to restore a man to a curacy.[47]

A useful line of cases showing the effect of the decision in *R.* v. *Jotham* is that concerning the restoration of sextons to office by means of the writ of mandamus. These cases extend over a period both before and after the *Jotham* case, and thus accentuate the fact that that case only clarified the law and did not institute any dramatic changes. Mandamus as a means of compelling the admittance or restoration of sextons was recognised by the eighteenth century,[48] and a case reported in 1682[49] was illustrative of a sexton being restored after the minister and others of the parish had certified that he held the post for life. The writ was, however, refused in later cases where no such certificate was forthcoming and there was no other proof that he held the office for life.[50] Even as late as 1915 Lord Coleridge, Darling and Shearman JJ. refused to allow the writ to issue to restore a sexton on the ground that he had failed to show he had been appointed to the office as a freehold for life.[51]

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[44] Perhaps Lord Kenyon was carried away somewhat by his feelings, for the case concerned the admission, not the restoration, of a vestry clerk, as we have stated above. Neither the colour nor the validity of his argument, however, is affected by this inaccuracy.

[45] (1790) 3 T.R. at p. 577.

[46] *Evans* v. *Hearts of Oak Benefit Society* (1866) 12 Jur.(N.S.) 163.

[47] *e.g.*, *R.* v. *Blooer* (1760) 2 Burr. 1043.

[48] See the dicta of Lord Mansfield in *R.* v. *Barker*, *supra.*

[49] *Ile's Case*, 1 Ventr. 153.

There was some doubt in the latter half of the eighteenth century whether a mandamus would issue to restore a parish clerk to his office. In *R.* v. *Proctor*[52] a parson had removed a parish clerk appointed by the former incumbent, but the court made no decision as to whether the writ should issue, and merely recommended the clergyman to restore him upon his asking pardon for the offence he had committed. But in *R.* v. *Warren*[53] it was held that the office of parish clerk was a temporal one,[54] and that the parson must show good ground for turning him out. Even though a vicar appointed him he could not remove him without sufficient cause, and where such a sufficient cause was thought to exist, yet the vicar would never be the sole judge and remove him *ad libitum*, for he was subject to the control of the court.

We see, therefore, that a mandamus has for a long time been, and still is, a remedy for wrongful exclusion from office, providing that office be a public one. But, although a mandamus to admit to an office will be allowed to enable the applicant to test his right to the position, the remedy will not issue to compel his restoration unless he can show a prima facie title to that position. One further qualification must be added, for no mandamus will issue to restore a man rightly removed from his office. This has been held to be so where the grounds for the removal were good, even though no notice of removal had been given at the time,[55] or even if the applicant had been irregularly suspended from office.[56] A case of 1863 [57] is a good example of the state of the law at present, for it has not changed since then. By the statute 21 & 22 Vict. c. 90, s. 29, it was provided that if a medical practitioner shall, after due inquiry, be judged by the General Council of Medical Education and Registration of the United Kingdom to have been "guilty of infamous conduct in any professional respect," they may, if they see fit, erase his name from the register. Here a medical officer had been so adjudged guilty of infamous conduct by the General Council and his name was erased from the register. It was held that a mandamus would not lie to restore it.[58]

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[50] *R.* v. *Churchwardens of Thame* (1718) 1 Str. 115; *Merrick's Case* (1804) 2 Peck. 91.

[51] *R.* v. *Vicar and Churchwardens of Dymock, ex p. Brooke* [1915] 1 K.B. 147.

[52] (1774), reported in *R.* v. *Warren* (1776) 1 Cowp. at p. 371, *per* Aston J.

[53] *Supra.*

[54] Following the unreported case of *R.* v. *Dr. Ashton* (1754), referred to by Lord Mansfield at p. 371.

II. *Non-Performance of a Duty*

Where certain bodies of persons fail to perform a duty which is binding upon them mandamus has often been held to be the most convenient method of obtaining a remedy. It is not appropriate in this article to consider fully the bodies to which such a remedy may apply, but let it suffice to say that the writ has issued to compel magistrates to carry out their obligations,[59] and to order such a person as the Vice-Chancellor of the University of Cambridge to set the University seal upon the appointment of a duly elected High Steward.[60]

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[55] *R.* v. *Uxbridge Corporation* (1777) 2 Cowp. 523.

[56] *R.* v. *London Corporation* (1787) 2 T.R. 177, following *R.* v. *Uxbridge Corporation, supra.*

[57] *Ex p. La Mert*, 5 B. & S. 582.

[58] This case is quite distinct from *General Medical Council* v. *Spackman* [1943] A.C. 627, in which a certiorari issued because the Council had not abided by the rule of *audi alteram partem*, a point not relevant here. A registered medical practitioner had been found by the Divorce Division to have committed adultery with a person to whom he stood in a professional relationship, and at a hearing before the General Medical Council the Council refused to allow him to tender fresh evidence on the issue of adultery, which had not been called at the hearing of the petition although it was then available. The actual facts of the *Spackman* case could never occur again, because the Medical Act, 1950, s. 18 (2), provides that in any inquiry under section 29 of the Medical Act, 1858, "whether a person has been guilty of infamous conduct in any professional respect, any finding of fact which is shown to have been made in any matrimonial proceedings in the United Kingdom or the Republic of Ireland, being proceedings in the High Court or the Court of Session or on appeal from a decision in such proceedings, shall be conclusive evidence of the fact found."

[59] See the judgment of Lord Kenyon C.J. in *R.* v. *Bristow* (1795) 6 T.R. 168, at p. 170.

A type of case in which there have been several instances of the writ issuing is where it is sought to compel a body to assess and award compensation, as for loss of office.[61] In one case, for instance,[62] the writ lay to the Commissioners of Woods and Forests to command them to issue their warrant to the Sheriff, so that he should summon a jury to assess compensation for land required by them. Again in a case in the present century when a borough council had not acted according to their own judgment on a question of compensation but had " borrowed a measure from the Treasury," the writ lay to compel them to take the facts of the case into consideration.[63] But, on the other hand, the writ has been refused where licensing justices have merely made an erroneous decision, within their jurisdiction, on the amount of compensation.[64] If, however, a mandamus has been sought in respect of only part of a claim, and not in respect of the whole claim, as where the claim was for assessment of compensation for land to be taken by a railway company, under the Lands Clauses Consolidation

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[60] *R.* v. *University of Cambridge* (1765) 1 Bl.W. 547; see also *R.* v. *Windham* (1776) 1 Cowp. 377; but compare *R.* v. *Dunsheath, ex p. Meredith* [1951] 1 K.B. 127, in which a mandamus was refused against a University officer, because the matter was a domestic one, within the jurisdiction of the Visitor.

[61] *R.* v. *Local Government Board* (1874) L.R. 9 Q.B. 148 (the loss of the office of solicitor to a board of guardians); *R.* v. *Postmaster-General* (1878) 3 Q.B.D. 428.

[62] *R.* v. *Woods and Forests Commissioners, Re Budge* (1848) 17 L.J.Q.B. 341.

[63] *R.* v. *Stepney Corporation* [1902] 1 K.B. 317, 324; see also *R.* v. *Pontypridd County Court Registrar* [1948] 1 All E.R. 218, in which mandamus lay where there had been an improper exercise of discretion in awarding compensation to miners for ill-health. Again *R.* v. *Nuneaton JJ., ex p. Parker* [1954] 1 W.L.R. 1318: a police inspector applied to the justices for a summons for careless driving, but the justices refused to grant the summons on the ground that, as a matter of principle, they would not issue summonses for careless driving unless satisfied that there could not possibly be a conviction for dangerous driving on the evidence available. The Divisional Court awarded a mandamus on the ground that it must be left to the prosecution to decide which charge it will prefer.

[64] *R.* v. *Cheshire JJ., ex p. Heaver* (1913) 108 L.T. 374; see also *R.* v. *Monmouthshire JJ.* (1914) 109 L.T. 788 (no mandamus will lie if the decision of a compensation authority is final, according to statute, and no extraneous matters have been taken into consideration).

Act, 1845, s. 18, then the application is bad, and the issue of the remedy will be refused.[65]

To enforce the performance of a duty the normal rule is that there must have been a previous demand of the performance of the duty before a mandamus may be claimed,[66] and the demand must be followed by a refusal to perform.[67] The refusal need not have been a positive one, so long as it is clear that the party complained of has distinctly determined not to do what is demanded.[68] It was held in a case of 1825[69] that there must have been a definite refusal to do the act, the parties being perfectly acquainted with the act they were required to perform; but, in view of the later decision in *R.* v. *Bristol and Exeter Railway*,[70] that case must be interpreted as laying down merely that, though there may have been no positive refusal, yet it is certain the act will not be performed. Thus an adjournment of a case by a county court judge with a view to the parties arriving at a possible settlement is not a refusal to adjudicate,[71] whereas justices who have failed to issue a summons have been held to have refused cognisance of a matter.[72] Where a mandamus has been refused because there has been no previous demand and refusal it may not be obtained on a second application, even though such demand and refusal have since taken place.[73] An interesting exception to the whole general rule was, however, provided by the case of *R.* v. *Revising Barrister, R.* v. *Stoke-on-Trent Town Clerk.*[74] A revising barrister for a Parliamentary borough, owing to an accident to his right hand, availed himself of clerical assistance to mark upon the lists of voters the results of his decisions, as pronounced orally in court. By some inadvertence the clerk omitted to strike off the lists the names of some persons who had been successfully objected to, and whose names were ordered by the revising barrister to be expunged. The lists, with those names remaining on them, were delivered by the revising barrister to the Town Clerk, and the names were accordingly printed in the register of electors for the borough. The mistake was not discovered till the expiration of some months after the register had come into operation, and the original lists of voters had been either lost or destroyed. It was held that the court had jurisdiction to grant writs of mandamus to the revising barrister and to the Town Clerk to order them to have the mistake corrected; that in the circumstances there need not be a previous demand and refusal to do the act sought to be enforced; and that the proper course was for the revising barrister to expunge the names on a copy of the register, and to deliver the same to the Town Clerk, and for the Town Clerk to make the necessary corrections in the register.

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[65] *R.* v. *L.S.W. Ry.* (1848) 17 L.J.Q.B. 326; see also *R.* v. *Tithe Commissioners for England and Wales* (1849) 14 Q.B. 459 (if the writ is bad in part it will be bad *in toto*, and the court will not divide it, so as to enforce only one part of it).

[66] *R.* v. *Wiltshire and Berkshire Canal Navigation Co.* (1835) 3 A. & E. 477 (the demand for inspection of documents, authorised by statute, should also contain a statement of the object for which inspection is wanted).

[67] *R.* v. *Brecknock and Abergavenny Ry.* (1835) 3 A. & E. 217; *R.* v. *Bristol and Exeter Ry.* (1843) 4 Q.B. 162. See also a line of cases stretching from the eighteenth to the twentieth century concerning mandamus for delivery up of books and documents: *R.* v. *Wildman* (1730) 2 Str. 879; *R.* v. *Hostmen of Newcastle* (1744) 2 Str. 1223; *R.* v. *Shelley* (1789) 3 T.R. 141; *R.* v. *Allgood* (1798) 7 T.R. 746; *R.* v. *Tower* (1815) 4 M. & S. 162; *R.* v. *Merchant Tailors' Co.* (1831) 2 B. & Ad. 115; *R.* v. *London and St. Katherine's Docks Co.* (1874) 44 L.J.Q.B. 4; *R.* v. *Southwold Corporation, ex p. Wrightson* (1907) 97 L.T. 431; *R.* v. *Godstone R. D. C.* [1911] 2 K.B. 465; *R.* v. *Hampstead Borough Council, ex p. Woodward* (1917) 116 L.T. 213.

[68] *R.* v. *Bristol and Exeter Ry., supra.*

[69] *R.* v. *Leicester JJ.*, 4 B. & C. 891; see also *R.* v. *Cornwall JJ.* [1903] 2 K.B. 178; and *Att.-Gen.* v. *West Riding of Yorkshire County Council* [1907] A.C. 29.

[70] *Supra.*

[71] *Irving* v. *Askew* (1869) L.R. 5 Q.B. 208.

[72] *R.* v. *Adamson* (1875) 1 Q.B.D. 201; *R.* v. *Nuneaton JJ., ex p. Parker, supra.*

III. *No Proper Hearing*

The most often invoked ground for mandamus, even though it may be of more recent origin than those already considered, exists where there has been no proper hearing of a matter in an inferior court or tribunal. A mandamus will issue to compel the holding of a proper hearing and determination if such court or tribunal has failed to hear a cause before it according to its proper authority and discretion.[75] This may occur for instance where a magistrate refuses to issue a summons after taking extraneous matters into consideration.[76] In one case a complaint to the justices had been dismissed because of six months' delay in bringing the complaint. When, therefore, a complaint on similar grounds was later made to other justices the latter magistrates dismissed the summons, declining jurisdiction. It was held that a rule for a mandamus should be made absolute because there had been no proper determination as to whether or not the summons in this case should issue [77]; the ground for the previous dismissal of a complaint had been that of delay, which did not necessarily apply to the second complaint. But a case of 1900 made it clear that a magistrate will not be ordered, by means of mandamus, to state a case on a point of law which he has decided in accordance with a previous decision of the High Court upon exactly the same point, and from which there was no right of appeal.[78] No mandamus will issue, moreover, if justices refuse to issue a summons after properly hearing the application.[79] Two interesting cases at the turn of the present century illustrate this neatly. In the first [80] a Jew had opened his baker's shop to sell bread on Sundays, but closed it on his Sabbath (Saturday), and the magistrate, in the proper exercise of his discretion, refused to issue a summons for selling bread on Sunday, contrary to the statute 3 Geo. 4, c. cvi, s. 16. In the second [81] the magistrate, in his discretion, refused to issue a summons for an offence under section 34 of the Roman Catholic Relief Act, 1829, for, although the information disclosed a prima facie case that the offence was committed, nevertheless the magistrate was entitled to refuse to issue the summons because he was of opinion that an action under the Act instituted by the Crown was more appropriate to the case, and that in any event the statute invoked by the applicant was practically obsolete.[82] Thus rules for a mandamus were refused in both cases since the magistrates had properly heard and determined the cases before them.

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[73] *R.* v. *Pickles* (1842) 12 L.J.Q.B. 40; *Ex p. Thompson* (1845) 6 Q.B. 721; *R.* v. *Bodmin Corporation* [1892] 2 Q.B. 21.

[74] [1912] 3 K.B. 518.

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[75] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180; *R.* v. *Pontypridd County Court Registrar* [1948] 1 All E.R. 218; *R.* v. *Stepney Corporation* [1902] 1 K.B. 317; *R.* v. *Agricultural Land Tribunal for the Eastern Province of England, ex p. Grant* [1956] 1 W.L.R. 1240.

[76] *R.* v. *Adamson* (1875) 1 Q.B.D. 201; *R.* v. *Curtis Bennet and Bond* (1908) 24 T.L.R. 681.

[77] *R.* v. *Byrde and Pontypool Gas Co.* (1890) 60 L.J.M.C. 17.

[78] *R.* v. *Shiel* (1900) 82 L.T. 587.

[79] *Re Leeds Stipendiary* (1877) 43 J.P. 743; *R.* v. *Battier* (1880) 44 J.P. 490; *Ex p. McMahon* (1883) 48 J.P. 70; *Ex p. Reid* (1884) 49 J.P. 600; *Ex p. Lewis* (1888) 21 Q.B.D. 191. In *R.* v. *Biron* (1884) 14 Q.B.D. 474, a magistrate, following a rule of practice, refused to hear a second application for a summons, on the ground that the second application should be heard by the magistrate who heard the first one, and a mandamus was refused.

[80] *R.* v. *Bros* (1901) 18 T.L.R. 39.

[81] *R.* v. *Kennedy* (1902) 86 L.T. 753.

Generally there is little difficulty in deciding whether or not there had been a proper hearing in an inferior court, but some cases have introduced fine distinctions. *R.* v. *L.C.C., ex p. Akkersdyk*[83] was a case in point. The London County Council in determining applications for music and dancing licences is acting judicially, and is bound by the same principles as are binding on justices when deciding matters which come before them for judicial decision. The Council had in this instance delegated to a committee of its body the hearing of applications for the licences, and the committee by a majority had recommended that a licence which had been applied for should not be granted, whereupon the applicant applied to the London County Council itself for the licence. At the hearing before the County Council certain members, who were also members of the committee and had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them and oppose the application. The County Council by a majority refused the application; but, since the councillors so instructing counsel were present at the hearing even though they did not vote, it was held that the hearing was improper, and a writ of mandamus issued to order the London County Council to give the application a proper hearing. This was perhaps an unusual case, but it serves to illustrate the possibility of fine distinctions.

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[82] *Cf.* the view of Vaisey J. in *Prince Ernest of Hanover* v. *Att.-Gen.* [1955] Ch. 440, concerning the gradual obsolescence of the statute 4 & 5 Anne, c. 16: see a Note by Clive Parry in [1955] Camb.L.J. 142. The Court of Appeal has since reversed the decision ([1956] Ch. 188), and the House of Lords has affirmed this ([1957] A.C. 436).

[83] [1892] 1 Q.B. 190. *Cf. Royal Aquarium Society* v. *Parkinson* [1892] 1 Q.B. 431. note also *R.* v. *West Norfolk Assessment Committee, ex p. Ward* (1930) 94 J.P. 201, in which, in the circumstances of the case, the court used its discretion and refused to make a rule for a mandamus, even though the tribunal had not properly heard and determined a matter, because the applicant had not brought up any fresh grounds for the writ to issue upon.

A recent case which fell the other way was that of *R.* v. *Middlesex Quarter Sessions, ex p. D. P. P.*[84] There the accused at quarter sessions pleaded not guilty to a count in an indictment alleging that he had driven a motor-car while under the influence of drink. While the jury were in the box waiting to be sworn the chairman told prosecuting counsel that he had read the depositions very carefully and did not think that any jury would convict. On prosecuting counsel's submission that there was evidence to go to the jury the chairman ordered that the jury be sworn, saying that in any case he would give them his view of the matter. After prosecuting counsel had opened the case the chairman made certain remarks of a similar nature to the jury, indicating that it would be a waste of time for them to hear any evidence, and that the defendant should be acquitted; and, before any evidence was called, he asked the jury whether they wished to hear any evidence. The foreman said they did not, and a verdict of "Not guilty by direction" was entered. The Director of Public Prosecutions applied for an order of certiorari to bring up and quash the acquittal, and for an order of mandamus to direct quarter sessions to try the accused according to law. It was held, however, that certiorari was inapplicable, because there was no error of law on the face of the record, and no mandamus would issue because there had been a hearing and determination. There had been no mistrial, as the accused had been properly arraigned and the jury sworn to try him, so that he had technically been in peril of being convicted. Thus, as the jury had returned a verdict of not guilty, however improperly it had been obtained, the court had no power to order a new trial. The curious recent case of *R.* v. *Norfolk JJ., ex p. D. P. P.*[85] is also worthy of note. Magistrates had convicted a prisoner and had sent him up to quarter sessions for sentence. But, since they had sent the case up to sessions erroneously, the justices at quarter sessions refused to sentence him, and the justices at petty sessions refused to proceed with the matter on the ground that they were, in their opinion, *functi officio.* A Divisional Court of five members, however, held that the case remained undisposed of and that the magistrates were not *functi officio.* The court therefore decided that an order of mandamus should issue, directing them to hear and determine the case *by imposing sentence.*

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[84] [1952] 2 Q.B. 758. see also *R.* v. *Folkestone and Area Rent Tribunal, ex p. Sharkey* [1952] 1 K.B. 54.

Writs of mandamus have issued where licensing justices have granted a transfer of a licence from someone who did not legally hold one,[86] or have granted a licence with the addition of a condition which showed that their decision was influenced by extraneous considerations[87]; and they also lie to command justices to hear and determine applications according to law where they have refused to renew or referred a licence on unsworn evidence.[88] A refusal to hear evidence, though not merely a rejection of it upon its own merits, amounts to a refusal to hear the matter, and a mandamus will issue to command a proper hearing.[89]

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[85] [1950] 2 K.B. 558; see too *R.* v. *Hallett, ex p. Smith* [1939] 2 K.B. 276, in which a Recorder had allowed an appeal from an affiliation order, but had agreed to state a case for the opinion of the High Court. He died, however, before signing it, and the new Recorder refused to sign it. It was held that the hearing and determination were still inchoate, and that a mandamus should issue directing quarter sessions to hear and determine the appeal.

[86] *R.* v. *Cotham* [1898] 1 Q.B. 802.

[87] *R.* v. *Bowman and Duncan* [1898] 1 Q.B. 663; *cf. R.* v. *Nicholson* [1899] 2 Q.B. 455; and *R.* v. *Howard* [1902] 2 K.B. 363, where the licensing justices' hearings were held to be proper. *Cf. R.* v. *County Licensing (Stage Plays) Committee of Flint County Council, ex p. Barrett* [1957] 1 Q.B. 350, noted by the author in (1957) 73 L.Q.R. 164.

[88] *R.* v. *Tolhurst, ex p. Farrell; R.* v. *Cox, ex p. West* [1905] 2 K.B. 478. On this topic, see also Yardley, "Revocation of Licences—An English Dilemma," 1956 *Juridical Review*, 240, 245–51.

[89] *R.* v. *Marsham* [1892] 1 Q.B. 371.

R. v. *Middlesex Quarter Sessions, ex p. D. P. P.* is distinguishable, because the jury in that case had in effect decided that there was no case for the accused to answer; there was no question of a plain rejection of all evidence. A refusal to receive admissible evidence through ignorance during the course of an otherwise proper adjudication does not amount to a refusal to hear evidence.[90] Again where quarter sessions, in the course of hearing an appeal, had heard the evidence on one side, but refused to hear part of the evidence on the other, on the ground that the testimony had been prefaced by observations on the part of the advocate contrary to their normal practice, the court refused to grant a mandamus to order sessions to re-hear the appeal.[91] This case was, perhaps, on the borderline, for it does appear that the behaviour of quarter sessions might have been construed as a refusal to hear evidence, but Holroyd J. asserted[92] that it was merely a question of the practice of the sessions and that it would have been different if the sessions had completely refused to hear one side. But the decision in *R.* v. *Carnarvonshire JJ.*[93] showed that the writ would issue if an appeal had been dismissed without a proper hearing at all. That decision was overruled in a later case[94] on the point that the appeal had been dismissed on a matter of fact, and a finding of fact could not be upset. We shall consider this point later in connection with the subject of a tribunal declining jurisdiction, but let it suffice for now to say that where an appeal is dismissed, within the proper exercise of jurisdiction of the court or tribunal, no mandamus will issue to order a re-hearing[95]; whereas the reverse is the case if the appeal is improperly dismissed without a genuine hearing at all.

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[90] *R.* v. *Yorkshire JJ., ex p. Gill* (1885) 53 L.T. 728.

[91] *R.* v. *Carnarvon JJ.* (1820) 4 B. & Ald. 86; *R.* v. *Frieston Inhabitants* (1833) 5 B. & Ad. 597; *Ex p. Smyth* (1835) 3 A. & E. 719; *Re Pratt* (1837) 7 A. & E. 27.

[92] 4 B. & Ald., at p. 88.

[93] (1841) 2 Q.B. 325; also *R.* v. *West Riding of Yorkshire JJ.* (1841) 2 Q.B. 331.

[94] *R.* v. *Kesteven JJ.* (1844) 3 Q.B. 810.

[95] *Ex p. Tebbitt Bros.* (1917) 116 L.T. 85. But see the three curious cases of the early nineteenth century in which the King's Bench held itself entitled to interfere by mandamus to compel the inferior court to hold a hearing where the appellant

Ecclesiastical cases

A word should here be said about ecclesiastical cases, for many mandamus cases have concerned church courts and matters, though such cases have become increasingly rare. The problems usually encountered in this connection are those in which there has been an application for a mandamus against a bishop. For example, in a case of 1812,[96] a rule nisi for a mandamus was obtained against the Bishop of London to command him to license a clerk chosen by the inhabitants of St. Bartholomew, Exchange, London, to an endowed lecturership in the parish church there, because the bishop had refused to license the clerk to the lecturership. But the rule was discharged upon the bishop showing that he had made diligent inquiry, within the provisions of the statute 13 & 14 Car. 2, c. 4, s. 19, concerning his conduct and ministry, and, being convinced, from such inquiry, that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him thereunto. It follows that the order will not issue where a bishop has acted within his discretion under an Act, as where he has refused to issue a commission to inquire into charges against a rector.[97] An interesting case was that of *R.* v. *Archbishop of Canterbury* in 1848.[98] The Archbishop had appointed commissioners to hear objections to the election of the Bishop of Hereford, and objections were entered by three clergymen in the diocese of Hereford that the candidate had published works repugnant to the doctrine of the established church, and had been censured therefor by the University of Oxford. Nevertheless the commissioners refused to hear the objections, and confirmed the election

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had been precluded from appeal on account of a new rule of practice unknown to his attorney, promulgated two sessions before, but never acted upon: *R.* v. *Wiltshire JJ.* (1808) 10 East 404; *R.* v. *Lancashire JJ.* (1828) 7 B. & C. 691; *R.* v. *Wiltshire JJ.* (1828) 8 B. & C. 380.

[96] *R.* v. *Archbishop of Canterbury and Bishop of London*, 15 East 117.

[97] *R.* v. *Bishop of Chichester* (1859) 29 L.J.Q.B. 23; see also *Julius* v. *Bishop of Oxford* (1880) 5 App.Cas. 214.

[98] (1848) 11 Q.B. 483.

in the form usual where no opposition was made. A rule nisi was obtained for a mandamus to the Metropolitan or his Vicar-General to hear the objections. Lord Denman C.J. and Erle J. considered that the commissioners acted rightly under the statute 25 Hen. 8, c. 20, and that the objections could not be heard, for the statute made it imperative on the Metropolitan to confirm the election without taking cognisance of such objections. Patteson and Coleridge JJ., on the other hand, thought that the objections ought to have been heard or that, at least, there was ground for requiring a return to the writ. So, with the court evenly divided, the rule was discharged and no order was made; but it was agreed that the case was one in which a mandamus would have been appropriate if the objections ought to have been heard. A much later case [99] determined that this decision was also correct on the facts, for it was there held that, upon the confirmation of the election of a bishop-elect by the Archbishop or his Vicar-General, there is no jurisdiction to entertain objections to the confirmation founded upon questions of doctrine, and a writ of mandamus will not lie to the Archbishop or his Vicar-General to compel them to hear and determine such objections.

No mandamus to compel the exercise of discretion in a particular way

It is important to note that it has been held consistently that a mandamus will not prescribe *how* a thing should be done; it will only order the inferior tribunal to " hear and decide." A magistrate cannot be controlled by mandamus in the conduct of his case, nor can the order direct what evidence he shall receive or reject.[1] The power of the Army Council to assemble a Court of Inquiry, for example, is a discretionary power, and the court will not order the Council to exercise its discretion in a particular way.[2] The only exception to this rule is where it is quite plain that what the judicial tribunal has to do is purely ministerial, in which case it may be ordered to perform this particular duty[3]; in this respect mandamus takes a different course from certiorari and prohibition, for it will issue where a duty is merely ministerial, and not judicial or quasi-judicial. It even follows as a corollary from the general rule that a mandamus will not lie to compel a person to *institute* legal proceedings,[4] since this would, in effect, order a discretion to be exercised in a particular way.

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[99] *R.* v. *Archbishop of Canterbury* [1902] 2 K.B. 503; it seems that a mandamus will not lie to the Archbishop to compel him, before proceeding to confirmation, to inform his mind of the fitness of the bishop-elect.

[1] *R.* v. *Halifax Overseers* (1841) 10 L.J.M.C. 81; *Re Dyson, ex p. Cook* (1860) 29 L.J.Q.B. 68, 69; *R.* v. *Sir R. Carden, ex p. Labouchère* (1879) 5 Q.B.D. 1.

Where ministerial acts are concerned it is of the utmost importance to discover whether the act is only within the discretion of the body which is to perform it, or whether it is in fact a duty, for only in the latter case will a mandamus issue to enforce its performance.[5] In an old case of 1770[6] an Act imported an authority, but not a command, to cut a canal to a certain place, and a mandamus to compel the company thus to complete the canal was refused. And in one strong case[7] a peremptory mandamus had actually issued to command the making of several ponds, where one watering-place only would have been sufficient under the statute 6 & 7 Will. 4, c. lxxxi, and the Court of Exchequer Chamber, with seven judges sitting, ordered the peremptory mandamus to be reversed. The only reported case in which apparently an act within the discretion of a body was ordered to be performed by means of a mandamus was in 1819.[8] There the " authority " of a railway company to reinstate and lay down again a railway line was held, in the facts of the case, to be enforceable, and the writ issued; but this case was refuted in *R.* v. *G.W. Ry.*,[9] and, as Bowen L.J. quaintly says in the latter case,[10] it is " now an old-fashioned case, and seems to be misreported."

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[2] *R.* v. *Army Council, ex p. Ravenscroft* [1917] 2 K.B. 504. *Cf. R.* v. *Army Council, ex p. Sandford* [1940] 1 K.B. 719: a petition to the Army Council to mitigate, remit or commute a sentence of a court-martial is a criminal cause or matter within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), and a motion to the Divisional Court to issue a mandamus to the Council to perform that duty is in a criminal cause or matter. Hence, no appeal to the Court of Appeal against a refusal of the motion was allowed. This was of course before the institution of the Courts-Martial Appeal Court by the Courts-Martial (Appeals) Act, 1951.

[3] *R.* v. *Kingston JJ.* (1902) 86 L.T. 589.

[4] *R.* v. *Southampton Port Commissioners* (1870) L.R. 4 H.L. 449, 485; but a direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction, therefore, does not make the writ bad *per se*.

[5] *R.* v. *Income Tax Special Purposes Commissioners* (1888) 21 Q.B.D. 313 (the writ lay to compel the Special Commissioners to repay overpaid tax, since this was an absolute duty); *R.* v. *Marshland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155.

[6] *R.* v. *Birmingham Canal Navigation*, 2 Bl.W. 708; see also *Ex p. Nash* (1850) 15 Q.B. 92; and *Re Ham Local Board of Health* (1857) 26 L.J.M.C. 64.

[7] *York and North Midland Ry.* v. *Milner* (1846) 15 L.J.Q.B. 379.

Whenever the inferior tribunal has a discretion in the course of the exercise of its powers mandamus has never been allowed to issue as a means of causing review of the exercise of that discretion, providing it appears to have been properly so exercised.[11] The superior court will interfere only where justice demands it. Thus no mandamus issued where justices had properly exercised their discretion in refusing to continue further with a matter of which an ecclesiastical court had jurisdiction,[12] nor did it issue where the Attorney-General properly exercised his discretion in refusing a fiat for a writ of error.[13] An instance of a case in which the writ was issued, on the other hand, is *R.* v. *Boteler* in 1864.[14] An extra-parochial place became part of a parish, under the statute 20 Vict. c. 19, s. 1, and, as such, became liable to contribute to the expenses of the parish; and the statute 2 & 3 Vict. c. 84, s. 1, gives justices power, "if they think fit," to issue their warrant for levying the amount. In this case, however, the justices refused to issue the warrant, proceeding upon the ground that the annexation of this extra-parochial place to the union was unjust—in other words, that the operation of the Act of Parliament under which that was effected was unjust—pretending this matter to be within their jurisdiction. Hence a mandamus issued to order a proper hearing and determination. In a case of 1890 [15] it was held that a metropolitan vestry had a discretion, under 29 & 30 Vict. c. 31, s. 1, not merely as to the granting or refusing of a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in section 4. This latter point overruled the previous decision in *R.* v. *Vestry of St. George's, Southwark*,[16] where it had been held that they had no discretion as to the amount. Since the vestry, therefore, had been influenced by the idea that they had no discretion as to the amount, it was decided that they had not properly exercised their discretion, and that a mandamus should go to them to consider and determine an application properly. A case in the following year is, however, a contrast to this.[17] The Lord Bishop of London acted properly within his discretion in thoroughly considering two representations made to him, under section 8 of the Public Worship Regulation Act, 1874, against images in St. Paul's Cathedral, and rejecting them, stating his reasons as provided by section 9 of the Act; for, provided the bishop considered the circumstances he thought he ought to consider, it was held that his discretion could not be questioned, and the court could not decide what considerations ought to govern the bishop's opinion.

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[8] *R.* v. *Severn and Wye Ry.*, 2 B. & Ald. 646.

[9] (1893) 69 L.T. 572.

[10] *Ibid.*, at p. 575.

[11] *R.* v. *Carnarvon JJ.* (1820) 4 B. & Ald. 86, 88; *Ex p. Becke* (1832) 3 B. & Ad. 704, 705; *R.* v. *Bolton* (1841) 1 Q.B. 66. *R.* v. *West Riding of Yorkshire JJ.* (1849) 14 Q.B. 396; *R.* v. *Huggins and Humphries* (1891) 60 L J.M.C. 139; *R.* v. *Leicestershire JJ.* (1813) 1 M. & S. 442 (whether a verdict or judgment is properly entered on the record is a matter for the court at which the hearing took place); *R.* v. *Bros* (1901) 18 T.L.R. 39; *R.* v. *Kennedy* (1902) 86 L.T. 753; *R.* v. *Crossman, ex p. Chetwynd* (1908) 98 L.T. 760; *R.* v. *Somerset JJ.* [1950] 1 K.B. 519 (a matter was entirely within quarter sessions' discretion).

[12] *R.* v. *Ingham* (1850) 19 L.J.M.C. 69.

[13] *R.* v. *Newton* (1855) 24 L.J.Q.B. 246. Or in refusing a fiat for an appeal to the House of Lords in a criminal case, where the application was made out of time: *Ex p. Blackburn* [1956] 1 W.L.R. 1193.

[14] 4 B. & S. 959; *cf. R.* v. *Garland* (1870) L.R. 5 Q.B. 269; but see *R.* v. *Adamson* (1875) 1 Q.B.D. 201 (extraneous matters taken into consideration); *R.* v. *Mead, ex p. National Health Insurance Commissioners* (1916) 85 L.J.K.B. 1065 (a magistrate may refuse to issue a summons because of lack of evidence, but not on extraneous considerations).

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[15] *R.* v. *St. Pancras Vestry*, 24 Q.B.D. 371; see also *R.* v. *Pontypridd County Court Registrar* [1948] 1 All E.R. 218.

[16] (1887) 19 Q.B.D. 533.

[17] *Allcroft* v. *Bishop of London, Lighton* v. *Bishop of London* [1891] A.C. 666; see also *R.* v. *Robson* (1893) 9 T.L.R. 163; *R.* v. *Metropolitan Goods Vehicles Licensing Authority* [1949] 2 K.B. 17.

An interesting case in the present century, illustrative of the principles stated above, is that of *R.* v. *Brighton Corporation, ex p. Tilling, Ltd.*[18] The corporation refused an application for licences to run omnibuses and char-à-bancs in Brighton, and they gave as their reason as regards the omnibuses the fact that the Chief Constable had stated that there was a sufficient local service, that the streets were narrow, and that a competing company would constitute a public danger. They gave no reason, however, for their refusal of a licence to run char-à-bancs, and it was held that they had exercised their discretion properly concerning the omnibuses, but that a rule must be made absolute for a mandamus compelling them to hear and determine the application for a licence for the char-à-bancs, because it appeared that they might have taken irrelevant factors into consideration. But where reasons are given for the exercise of a discretion the court will not interfere if the decision was an " honest " one within the discretion of the inferior court,[19] and the usual factor rebutting " honesty " is the consideration of extraneous matters.[20] A decision may still be " honest " even though it is the result of the misconstruction of a statute.[21] What is more, affidavit evidence is not admissible to show that a tribunal meant something different from what it said on the record,[22] though, as Mr. de Smith has pointed out,[23] oral statements are admissible in an application for mandamus to hear and determine a matter, since they may show that the tribunal has taken into account irrelevant considerations in arriving at its decision.

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[18] [1916] 114 L.T. 800; for further examples, see *R.* v. *L. C. C., ex p. London and Provincial Electric Theatres, Ltd.* [1915] 2 K.B. 466; *R.* v. *Port of London Authority, ex p. Kynoch, Ltd.* [1919] 1 K.B. 176; *R.* v. *Cambridge Corporation, ex p. Cambridge Picture Playhouses, Ltd.* [1922] 1 K.B. 250.

[19] *Smith* v. *Chorley R. D. C.* [1897] 1 Q.B. 678; *R.* v. *Folkestone and Area Rent Tribunal, ex p. Sharkey* [1952] 1 K.B. 54.

[20] *R.* v. *Tynemouth R. D. C.* [1896] 2 Q.B. 451; *R.* v. *Bowman and Duncan* [1898] 1 Q.B. 663; *cf. R.* v. *Monmouthshire JJ.* (1914) 109 L.T. 788 (the decision of a compensation authority was final, under the Licensing (Consolidation) Act, 1910, s. 20 (1) (2), and no extraneous matters had been taken into consideration).

[21] *R.* v. *Eastbourne Corporation* (1900) 83 L.T. 338; *cf. R.* v. *Cotham* [1898] 1 Q.B. 802, in which licensing justices had disregarded the provisions of a statute by acting on extraneous considerations, and mandamus issued.

[22] *R.* v. *Metropolitan Goods Vehicles Licensing Authority* [1949] 2 K.B. 17; *R.* v. *Carnarvon JJ.* (1820) 4 B. & Ald. 86; *R.* v. *Middlesex JJ.* (1877) 2 Q.B.D. 516. Such affidavit evidence may, however, be allowed to show that the tribunal had taken extraneous matters into consideration.

[23] Note (1951) 14 M.L.R. 207.

Where jurisdiction has been declined

What is the result if a tribunal completely declines jurisdiction in a matter? It depends whether the tribunal has declined it wrongly or whether it has done so within the proper exercise of its discretion, for only in the former eventuality will a mandamus issue [24]; it has long been held that neither mandamus, nor any other prerogative writ or order, is applicable if the decision by the tribunal of the question as to jurisdiction involves the decision of the merits of the case.[25] As we have seen above, the superior court cannot interfere with the " honest " decision of the body below within its discretion, and it was held in 1859 that a writ of mandamus was inappropriate where a bishop, acting within his statutory discretion, had refused to issue a commission to inquire into charges against a rector.[26] Cockburn C.J. in 1868 decided that, if jurisdiction was declined upon some question of fact not affecting the merits of the case, then the tribunal's decision was susceptible of review upon an application for mandamus, if there was a total absence of evidence to support the finding; but if there had been a real conflict of testimony upon some fact which went to the question of jurisdiction the court would not interfere, except upon very strong grounds.[27] Twenty years later, in a celebrated judgment,[28] Lord Esher M.R. drew a distinction between the case of a tribunal being entrusted with a limited jurisdiction to decide certain matters and that of a tribunal entrusted in addition with the power to determine all the facts in the matter, including the existence of the preliminary facts upon which its own jurisdiction depends. As Lord Esher says:

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[24] *R.* v. *Carnarvon JJ.*, *supra*, at p. 88; *R.* v. *Oxfordshire JJ.* (1843) 4 Q.B. 177; *R.* v. *Fawcett* (1868) 11 Cox 305; *R.* v. *Brown* (1857) 26 L.J.M.C. 183; *R.* v. *Adamson* (1875) 1 Q.B.D. 201; *R.* v. *Byrde and Pontypool Gas Co.* (1890) 60 L.J.M.C. 17; *R.* v. *Newton* (1892) 8 T.L.R. 487; *R.* v. *Curtis Bennet and Bond* (1908) 24 T.L.R. 681.

[25] *R.* v. *Bolton* (1841) 1 Q.B. 66; *R.* v. *Goodrich* (1850) 19 L.J.Q.B. 413; *Joseph* v. *Henry* (1850) 19 L.J.Q.B. 369; *Ex p. Tebbitt Bros.* (1917) 116 L.T. 85 (no mandamus to an appeal tribunal which refuses leave for a further appeal, after hearing and determining the matter).

[26] *R.* v. *Bishop of Chichester*, 29 L.J.Q.B. 23, *supra*.

[27] *Re Elston* v. *Rose*, L.R. 4 Q.B. 4.

[28] *R.* v. *Income Tax Special Purposes Commissioners* (1888) 21 Q.B.D. 313, 319.

> " In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends."

Cockburn C.J. and other judges had been groping towards this point, but it was not until Lord Esher spoke that it was really understood.

It was settled by the middle of the nineteenth century that a mere adjournment of a cause did not amount to a refusal to adjudicate,[29] but where, in a later case,[30] justices adjourned a summons for a criminal libel, pending civil proceedings taken between different parties for a different libel though arising out of the same matter, this was held to be an improper exercise of discretion,[31] whereby the magistrates had in fact declined jurisdiction. As Lord Coleridge C.J. said[32]:

> " Never, if I can possibly avoid it, will I interfere with the discretion of a magistrate, even where it has been exercised in a way in which I perhaps should not have exercised it myself, and still less where I am satisfied with the discretion."

But here such interference was unavoidable.

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[29] *Ex p. Monroe* (1858) 8 E. & B. 822; *Irving* v. *Askew* (1869) L.R. 5 Q.B. 208 (an adjournment with a view to the parties arriving at a settlement).

[30] *R.* v. *Evans* (1890) 62 L.T. 570.

[31] Such adjournment is in any case only necessary in cases of felony.

[32] *Ibid.*, at p. 571.

Decisions on fact and law

A line of cases in the last century draws an important distinction, for purposes of review, between decisions on matters of fact and those on matters of law. In a case of 1837,[33] an appellant against a conviction for trespass on land, under the statute 1 & 2 Will. 4, c. 32, s. 30, admitted the trespass, and offered only evidence that the property in the land was not as laid in the conviction. Quarter sessions having rejected the evidence and affirmed the conviction, without stating a case, the superior court refused to call upon them by mandamus to hear the case again, since the mistake, if any, was one of law, which they could not enter into since the appeal had already been heard and no case sent up. Perhaps the court meant "interpretation of law" rather than "mistake of law," for otherwise this case is hard to reconcile with the rule as it became established later. It is true nevertheless that two cases of 1841 were also decided on principles which were later repudiated.[34] In those cases quarter sessions had dismissed appeals against the removal of paupers from parishes without a proper hearing, by deciding against the appellants on preliminary points which were matters of fact, and it was held that mandamus issued to command the sessions to hear the appeals. These cases were expressly overruled in ***R.* v. *Kesteven JJ.*** three years later,[35] in which it was held that where sessions, on an appeal, decide, on a point preliminary to the whole case, or before the reception of a particular piece of evidence, that they will not hear the case further, their decision is conclusive if the point involves matter of fact only; but if it raises a point of practice, which the court perceives to be matter of law, then the court will grant a mandamus to order a hearing, if the decision was erroneous. This decision settled the law on the problem, and it was followed in succeeding cases,[36] but it is strange to note that one case reported in 1857 [37] was decided against what was undoubtedly already the existing law. The case was one in which a rule under the Justices' Protection Act, 1848, was moved for, and so it was not a mandamus case, but the principles applying to the two remedies are the same.[38] Under the statute 18 & 19 Vict. c. 120, the vestry of a parish was entitled to pave any new street, and the owners of the houses in the street were, on demand, to pay to the vestry the amount of the estimated expenses, such amount to be recovered before two justices, on summons, who were to hear and determine the matter. The owner of houses in a street having been summoned before a police magistrate to show cause why an order for the payment of his share of the estimated expense of paving the street should not be made upon him, the magistrate, after hearing the evidence, dismissed the complaint on the ground that, since the street had been dedicated to the public as a highway before the passing of the Act, it was not a "new street" within the meaning of it. Lord Campbell C.J., Wightman and Crompton JJ., held that they could not interfere because there had been an adjudication, even though erroneous in fact and law. This surely was a wrong decision, and the dissenting judge, Erle J., must have been right in saying that the decision by the magistrate was of a matter [39] going to his jurisdiction, and that the court could, therefore, review his decision.

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[33] *Re Pratt*, 7 A. & E. 27.

[34] *R.* v. *Carnarvonshire JJ.*, 2 Q.B. 325; *R.* v. *West Riding of Yorkshire JJ.*, 2 Q.B. 331. The decision in the earlier case of *R.* v. *Frieston Inhabitants* (1833) 5 B. & Ad. 597, was possibly contrary to those in these cases, but the report of the latter case is most unsatisfactory, and it is difficult to derive any cogent principles of law from it.

[35] (1844) 3 Q.B. 810: a statement of the grounds of appeal contained the statement that there was a settlement by an apprenticeship, but it did not describe the house in which the residence took place, and, since the appeal was dismissed because of this, it was held to be a decision on a matter of fact only, and a rule for a mandamus was discharged.

One thing which has always been certain is that the decision of an inferior court, even if in fact wrong, is not susceptible of review if the matter was entirely within the jurisdiction of that court,[40] and the applicant's sole complaint is as to the wrong decision. For instance, in a case of 1913,[41] licensing justices had refused to renew a licence, and had awarded compensation at various rates to the owner, licensee and lessees of certain premises. The lessees, however, claimed that they had not been adequately compensated for seven years of their lease, and they applied for certiorari and mandamus. Yet it was held that the justices' order was good upon its face: so no certiorari issued; but mandamus did not issue either, since the justices' decision had merely been erroneous upon a matter entirely within their jurisdiction.

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[36] *R.* v. *Goodrich, supra*; *R.* v. *Brown, supra*; *R.* v. *Newton, supra.*

[37] *R.* v. *Dayman*, 26 L.J.M.C. 128.

[38] *R.* v. *Dayman, supra.*

[39] His actual words were "of a fact going to his jurisdiction," but this is a confusion in terminology. The magistrate's decision was on a matter of fact amounting, in its context, to a matter of law (*i.e.*, the question whether the statute applied to a certain type of case), and Erle J. must have meant that this decision on a matter of *law* was subject to review.

Natural justice

In conclusion a few words must be said about natural justice. As a ground for review of a proceeding in an inferior tribunal it can be identified in origin with grounds involving a defect of jurisdiction of some sort in the inferior tribunal, although it does not have the same importance in relation to mandamus as to either certiorari or prohibition.[42] The limits of this rule as applied to mandamus are shown by ***R.* v. *Robson*.**[43] Licensing justices had granted the renewal of a licence, the opponents to the renewal failing to appear, and although the opponents appeared later the magistrates refused to re-hear the matter. It was held that the opponents had been given a reasonable opportunity to be heard; and so no mandamus lay. In an earlier case[44] the King's Bench refused to allow the writ to issue to compel the re-hearing of an appeal to quarter sessions, even though the sessions at the former hearing had refused to hear part of one side's evidence, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to the usual practice of the court. Holroyd J. said [45]:

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[40] *Cave* v. *Mountain* (1840) 1 M. & G. 257; *R.* v. *Bolton*, *supra*; *R.* v. *Goodrich*, *supra*; *Joseph* v. *Henry*, *supra*; *R.* v. *Brown*, *supra*; *Re Elston* v. *Rose*, *supra*.

[41] *R.* v. *Cheshire JJ.*, *ex p. Heaver*, 108 L.T. 374.

[42] See, *e.g.*, *Errington* v. *Minister of Health* [1935] 1 K.B. 249, 268, *per* Greer L.J.; *R.* v. *North*, *ex p. Oakey* [1927] 1 K.B. 491. The classic case concerning the nature of natural justice, and in particular the rule of *audi alteram partem*, is *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180, but it is not a mandamus case.

[43] (1893) 9 T.L.R. 163 (also there had been a delay of three months before the application for the writ).

[44] *R.* v. *Carnarvon JJ.* (1820) 4 B. & Ald. 86.

> " If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue; but, in this case, it appears to me that this was merely a question as to the practice of the sessions, who have determined that the evidence tendered ought not to have been introduced with observations on the part of the advocate."

Sometimes mandamus issues as a consequence of the issue of certiorari, the ground for which was a breach of a rule of natural justice, as in the modern case of *R.* v. *Pontypridd County Court Registrar*,[46] but in any event it is certain that it will issue if a breach of natural justice has negatived the existence of a proper hearing and determination.

D. C. M. YARDLEY.

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[45] *Ibid.*, at p. 88.

[46] [1948] 1 All E.R. 218, mentioned *supra*; *cf. R.* v. *Middlesex Quarter Sessions, ex p. D. P. P.* [1952] 2 Q.B. 758.

JOSEPH STORY AND GEORGE JOSEPH BELL

A RECENTLY published letter from Joseph Story to George Joseph Bell [1] calls attention to a little studied topic, contacts between Scottish and American lawyers, and influences of Scottish on American law, and vice versa, during the so-called formative era of American law.[2] It is hoped that Story's letter, reprinted at the end of this note, will encourage such study.

Speaking of conflict of laws, it will perhaps come as a surprise to many that Kames' *Principles of Equity*—that is, the Chapter on Foreign Matters added to the second, 1767, edition of the *Principles* [3]—was used as an authority on application of foreign law in American courts even before Huber's *de conflictu legum.*[4] And it is quite possible that the theory of comity became known first in the equity version of Lord Kames.[5]

The *Principles of Equity* and its author must have been in high regard in the United States. Suffice it to say that James Wilson, the Scottish-born member of the Supreme Court of the United States, in his Lectures on Law given at the University of Pennsylvania in 1790, referred to Kames prominently.[6]

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[1] 2 Am.J. Legal History 80 (1958). The original is in the Hampton L. Carson Collection of the Free Library of Philadelphia.

[2] On that era, see, notably, Pound, *The Formative Era of American Law* (1938, 1950 reprint).

[3] Chapter VIII of Book III: "Jurisdiction of the Court of Session with respect to Foreign Matters," pp. 345 to 374.

[4] First references in printed Reports are in *Millar* v. *Hall*, 1 Dall. 229, 230 (Sup. Ct.Pa. 1788), and *Camp* v. *Lockwood*, 1 Dall. 393, 398 (Phila.Co. 1788).

[5] The first reference to Huber is in *Camp* v. *Lockwood*, 1 Dall. 393, 397, 398 (Phila.Co. 1788). A translation of Huber's *de conflictu legum* was printed in note to *Emory* v. *Grenough*, 3 Dall. 369 (U.S. 1797).

[6] 1 Works of the Honourable James Wilson 43, 129 (Bird Wilson ed. 1804); 1 James Wilson, Works (J. D. Andrews ed. 1896). See Charles Page Smith, *James Wilson—Founding Father, 1742–1788*, p. 324 (Univ. of Carolina Press, 1956). On Kames, see Peter Stein, "Legal Thought in Eighteenth-Century Scotland" [1957] *Juridical Review*, 1, 9 *et seq.*

When we turn to the first treatise on American law, James Kent's *Commentaries on American Law*, first published in 1826, we find in it frequent comparative references to Scottish law. One source used is James Fergusson's *Reports of Decisions by the Consistorial Court of Scotland in actions of Divorce, concluding for dissolution of marriages celebrated under the English law.*"[7] Chancellor Kent had made use of the *Reports* before in *Holmes* v. *Remsen*,[8] a famous decision of the year 1820. The other source book on Scottish law used by Kent in his *Commentaries* is George Joseph Bell's *Commentaries on the Laws of Scotland.*[9] The references to Bell are many,[10] and, in the Preface to the second, 1832, edition of the *Commentaries*, there is a reference by Kent to the continuous improvements in the successive editions of Bell's work.[11] Bell, on the other hand, began to make references to American law beginning with the fourth, 1839, edition of his *Principles of the Law of Scotland.* Bell's principal sources were Kent's *Commentaries* and the works of Joseph Story.[12]

Passing to Joseph Story and his *Commentaries*, *Bailments*, published in 1832, has frequent references to Bell's *Commentaries* (4th and 5th editions), Erskine's *Institutes*, and Stair's *Institutions.*[13] In the *Commentaries on the Conflict of Laws, Foreign and Domestic*, first published in 1834, the references to Scottish law are very substantial. The *List of Authors Cited* includes the names of Erskine and Lord Kaims (*sic*).[14] Additionally used are Fergusson's

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[7] The Reports first appeared in 1817, and there was a further print by Thomas Clark, Law Booksellers, Edinburgh, in 1823. For a reference to the Reports, see 2 Kent, *Commentaries on American Law*, 93 (1827).

[8] 4 John.Ch.Rep. 460, 482 (N.Y. 1820). See 2 Kent, *op. cit.*, at 406.

[9] The work first appeared as *Treatise on the Law of Bankruptcy.* Much enlarged, it appeared as *Commentaries on the Law of Scotland* in 1810. Further editions by Bell himself—he died in 1843—in 1816–19 (3rd), 1821 (4th), 1826 (5th). On Bell, see George Wilton Wilton, *George Joseph Bell* (Edinburgh, 1929).

[10] See, *e.g.*, 3 Kent, *Commentaries on American Law*, 94, 116, 120, 124, 133n. (1828).

[11] 1 Kent, *op. cit.*, xi (2nd ed. 1832).

[12] Bell, *Principles of the Law of Scotland*, §§ 8, 43, 89, 97, 168, 1307, 1637, 1860 (Kent), 145, 168, 197 (Story on *Bailments*), 42, 1506, 1537, 1637, 1860 (Story on *Conflict of Laws*).

[13] See, *e.g.*, Story's *Commentaries on the Law of Bailments*, § 2, note 2 (1832).

[14] *Commentaries on the Conflict of Laws*, xiii (1834).

Reports[15] and Bell's *Commentaries*,[16] and also reports of decisions of the House of Lords on appeals from Scotland, as, for example, *Bruce* v. *Bruce*,[17] which had been one of the materials relied on in the leading Pennsylvania case *Desesbats* v. *Berquier*[18] on the law governing succession.

The immediate success of Story's *Commentaries on the Conflict of Laws in England* is well known.[19] In Scotland, the *Edinburgh Law Journal*,[20] published by the law bookseller Thomas Clark[21] in 1835, reproduced an extract of some pages from the *Commentaries*[22] and announced a forthcoming Edinburgh edition of the work.[23] And the Edinburgh edition, published by Thomas Clark, appeared the same year. We do not know whether the reprint had been authorised by the author. An advertisement by the publisher added to the volume contains a long quotation from a letter by James Fergusson with an evaluation of the work.[24] We have found in the Edinburgh edition two additions to the original text. In the *List of Authors Cited*, Fergusson's *Reports*[25] and the Brodie edition of Stair's

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[15] See, *e.g.*, at p. 183, note 1 (§ 221). Story used the 1823 print of the *Reports*. His copy, with cross-references by him at pp. 114 and 383, is in the Harvard Law Library.

[16] References, to the 4th, 1821, edition, are, *e.g.*, in §§ 331, 335, 341, 346, 366, 409, 423.

[17] 2 Bos. & Pul. 231, note, 126 Eng.Rep. 1251, note (1790).

[18] 1 Binn. 336, 341 (Pa. 1808) (by Duponceau).

[19] See references to the work by Tindal C.J. in *Huber* v. *Steiner*, 2 Bing.N.C. 202, 211, 132 Eng.Rep. 80, 83 (C.P. 1835); by Lord Brougham in *Don* v. *Lippmann*, 5 Cl. & Fin. 1, 17, 7 Eng.Rep. 303, 309 (H.L., from Scotland, 1837).

[20] See Brown, "Scottish Legal Periodicals," in Stair Society. *An Introductory Survey of the Sources and Literature of Scots Law*, 317, 319 (1936). The first volume was published by Blackwood, the second by Thomas Clark.

[21] Thomas Clark, the founder of the firm of T. & T. Clark, Publishers, Edinburgh, was born in Edinburgh in 1799 and opened a bookshop in 1821 in Parliament Square. He made several journeys to France, Holland and Germany, making the acquaintance of the leading booksellers in each country and at the same time widening his own knowledge of foreign literature. This led to the development and gradual extension of the theological side of the business as the demand for legal commentaries lessened. (Ed.)

[22] 2 Edinburgh L.J. 427 to 432 (1835).

[23] At 441. The original edition was reviewed in England in 4 *Legal Examiner and Law Chronicle* 512 (1835).

[24] Story, *Commentaries on the Conflict of Laws*, i, ii (Edinburgh, 1835). Excerpt from the letter in 2 *Life and Letters of Joseph Story*, 170 (Wm. W. Story, ed. 1851).

[25] At xiii.

Institutions of the Law of Scotland[26] are added, and numerous references to Brodie-Stair are added in the main body of the work. By whom the additions may have been made remains a matter of speculation. Story disregarded the Edinburgh additions in the further editions of his work.[27] He made use, on the other hand, in the second, 1841, edition of David Robertson's *Treatise on the Rules of the Law of Personal Succession in the Different Parts of the Realm*,[28] which Thomas Clark had brought out in 1836.

In the same year in which the Edinburgh edition of Story's *Commentaries* appeared, Clark also published—in the Collection, *The Cabinet Library of Scarce and Celebrated Tracts*[29]—Justice Story's *Discourse on the Past History, Present State, and Future Prospects of the Law.* This is an address which Story had delivered in 1821 before the members of the Suffolk Bar and which had appeared in the newly founded Boston periodical, the *American Jurist and Law Magazine*,[30] in 1829, the year Story became Dane Professor of Law at Harvard University.[30a]

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[26] At xiv. The Brodie edition, published by Thomas Clark, had appeared in 1826, and the Brodie Supplement in 1831.

[27] See the 2nd, 1841, edition, and the 3rd, brought out in 1846 shortly after Story's death (but prepared by him).

[28] Story, *Commentaries on the Conflict of Laws*, §§ 472, 474, 488, in note (2nd ed. 1841). Robertson had referred to the American authors Kent, Livermore and Story as being "still in few hands in this country. They introduce us to the study of the foreign jurists, in a way hitherto unknown in our common language. These writers have the additional advantage of bringing to the consideration of these subjects an intimate acquaintance with all that has been written and decided in regard to the different systems of laws obtaining in Great Britain. Their works form an important accession to the legal knowledge of the present age. Inquiries of this kind present a new field for the generous rivalry of kindred nations." Robertson, *Treatise on the Rules of the Law of Personal Succession* 76, note (*e*) (1836). See also p. 246, note (*d*), for a reference to the Edinburgh edition of Story's *Commentaries.* The Robertson *Treatise* was reprinted in Philadelphia in 1836 as volume 12 of "The Law Library," edited by Thomas L. Wharton.

[29] The first Tract published was Mackintosh's *Discourse on the Law of Nature and Nations*, the second was Story's *Discourse.*

[30] 1 Am.Jurist and Law Magazine 1 (1829).

[30a] In 1836, there followed a reprint, in volume II, pp. 144–250, of "The Students' Cabinet Library of Useful Tracts," of four literary discourses by Story, obviously taken from *The Miscellaneous Writings, Literary, Critical Juridical, and Political, of Joseph Story*, published in Boston in 1835, namely: the speech of 1826 before the Phi Beta Kappa Society, the speech of 1829 at the Boston Mechanics' Institute, the 1830 lecture before the Families of the Professors in

Clark engaged in still another reprinting venture involving an American work. In 1837 there appeared a volume, entitled *A Practical Treatise on Commercial and Maritime Law*, by James Kent, in which the parts in Kent's *Commentaries* dealing with commercial and maritime law are reprinted.[31] Again we do not know whether this reprint with the odd title was authorised by the author.

While we have found no information on direct contacts between the Edinburgh group and Kent and Story as of that time, there is some material on contacts in the immediately following years. One of Story's favourite students, Charles Sumner, the later anti-slavery leader and distinguished American statesman,[32] long had had the urge to visit Europe. Francis Lieber, his mentor, had told him of the Continent,[33] and Sumner had established many contacts as co-editor since 1834 of the *American Jurist and Law Magazine*. Aided by Story and others, he finally left for Europe in December, 1837. After several months on the Continent, he went to London in June, 1838, and he visited Scotland in August of that year. In Edinburgh, he met Bell, Fergusson, the publisher Clark, and many others. On his impressions he reported to friends in the States, and his letters have been published.[34] Of particular interest is a

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Harvard College, and the lecture on the Science of Government delivered in 1834 at the American Institute of Instruction.

[31] Says the *Advertisement*, p. iii: "The Commentaries of this distinguished Jurist have, for nearly ten years, enjoyed a high reputation in Great Britain, as well as America, and the Publisher trusts that, in presenting to the Profession in this Country the following portion of a work so justly celebrated, he has performed an acceptable service. The Commercial and Maritime Law of America is founded on the same principles as that of Great Britain; and the multitude of important cases which occur in the former country, must contribute essentially to illustrate this important subject, and the high character and profound learning which such names as Marshall, and Story, and Kent, has invested the American Bench, will, undoubtedly, entitle their opinions to high respect, though they may not, perhaps, be cited as authorities in our Courts." Reprinted: Of the History of Maritime Insurance, the Law of Partnership, Negotiable Paper, Title to Merchant Vessels, Persons employed in Navigation, Contract of Affreightment, Marine Insurance, Maritime Loans, Insurance of Lives and against Fire, Contracts, Bailment, Principal and Agent, Incorporeal Hereditaments. See review in 14 *Legal Observer* 203 (London, 1837).

[32] On Sumner, see, *e.g.*, Moorfield Storey, *Charles Sumner* (1900).

[33] On Lieber and Sumner, see Frank Freidel, *Francis Lieber* (1947).

[34] In 1 Edward L. Pierce, *Memoir and Letters of Charles Sumner*, 357 *et seq.* (1878).

letter to Judge Story of October 7, 1838,[35] which is reproduced at the end of this note, before Story's letter to Bell.

Obviously as a consequence of Sumner's visit, Bell sent to Story his *Principles of the Law of Scotland* and the three volumes of *Illustrations of the Principles from Adjudicated Cases* which had appeared between 1836 and 1838.[36] Story's letter of acknowledgment, dated June 8, 1839, is found below. Later publications of Story show additional references to Bell's *Commentaries.* The Preface to the *Commentaries on the Law of Partnership*, which came out in 1841, has this passage: "Mr. Bell's excellent *Commentaries upon the Commercial Law of Scotland* are at once learned, comprehensive and exhausting, and have afforded me very great assistance."[37] And a similar reference is added in the second edition of the *Commentaries on the Conflict of Laws.*[38]

But whatever the importance of these exchanges of expression of esteem, we have here a fine example of profitable exchange of information on foreign law among leading jurists and, as a happy by-product, in Story's letter to Bell[39] one of the most felicitous formulations of Story's faith in comparative law work for achievement of greater uniformity of the law to the advantage of commerce and intercourse between nations.

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[35] At 366, 367.

[36] In sending the two books Bell wrote to Story a letter dated Edinburgh, December 12, 1838, as follows: "I have to acknowledge many obligations to you for knowledge imparted and views opened of great consequence, and you will easily believe me in expressing my respect for your labors, when I tell you that, in learning from your friend, Mr. Sumner, your intention of writing on the Law of Agency, I at once abandoned a half-completed work on that important subject.

"I have ventured to send to you two books, which, from a sense of duty to my pupils, I have lately published—one on the Principles of the Laws of Scotland, another of illustrations of these principles from adjudged cases. You will, of course, receive them, as they were intended, not for the perusal of the masters in jurisprudence, but for the initiation of students.

"While your books and judicial arguments are filling us (those of us who do read) with admiration, it cannot fail to give us some little pain to see that you are, in great views and comprehensive learning, getting far before us. But I trust this will only excite us to that generous strife and emulation out of which may come universal improvement."—2 *Life and Letters of Joseph Story* 302 (Wm. W. Story ed., 1851).

[37] Story, *Commentaries on the Law of Partnership*, vi (1841).

[38] Story, *Commentaries on the Conflict of Laws*, § 404, p. 337, note 1 (2nd ed., 1841). See also § 423e (paragraph added).

[39] Bell communicated Story's letter, and another one received from Kent, to his friend Lord Jeffrey. Jeffrey returned the letters with a note, dated Craigcrook, Sunday Evening, July 7, 1839: "My dear Bell—It is very pleasing to have such letters written to one's friend, and one's profession and country; and still more pleasant to think that we (in some sort) deserve to be so written of. If we were

KURT H. NADELMANN.

APPENDIX A

CHARLES SUMNER TO JOSEPH STORY

Stirling, October 7, 1838

"I have long wished to write to you of Edinburgh and its society. . . . It was a season when everybody was out of town, so that I saw only comparatively a few persons; but they were the *élite*. Among others, I saw Professor Bell, the venerable author of the work on Commercial Law. He came out to Lord Jeffrey's at dinner, though, poor man, he ate nothing, as his physician had cut him off from dinner; he afterwards came to Sir William Hamilton's, where he ate nothing. I breakfasted with him; and he was so good as to go with me over the courts, and explain to me their different jurisdictions. I assure you a worthier or more warm-hearted old gentleman does not exist in either hemisphere. He is advanced in life—say seventy—and, I fear, quite weak, even for his years. He told me that he was the first person in Scotland who imported a copy of Pothier. His works, in a pecuniary sense, I understand, have been losing affairs. He was well acquainted with Kent's *Commentaries*, and inquired after the Chancellor as if for an old friend. I shall not fail to write the Chancellor the agreeable inquiries which have been made with regard to him by Mr. Bell, and also by Pardessus at Paris. You are perhaps aware that Clark, the bookseller, has published a neat volume, containing the *commercial* parts of Kent's *Commentaries*; but, though he received highly commendatory letters from Lord Denman and Lord Chief Justice Tindal, the book has not succeeded. On the other hand, your *Conflict of Laws* has entirely succeeded. Of that he published an edition of one thousand copies. Clark is a gentlemanly, intelligent, pushing man. I dined one day in Edinburgh with Fergusson, the author of the *Consistory Reports*, who is a bland, noble gentleman, of seventy. He and Bell are both clerks of Session, as Scott was;

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all as zealous and unwearied in the discharge of our duties as you are, we should have more of the latter feeling. As it is, it must be chastised, I fear in most, by many compunctious visitings. But you may always look back to such memorials as this without a pang of self-reproach. God bless you": 2 Lord Cockburn, *Life of Lord Jeffrey, with a Selection from his Correspondence* 301 (Edinburgh, 2nd ed., 1852).

so that they are entirely comfortable. Robertson, who has written a work on *Personal Succession*, had it all printed and just ready to be published, when he met your work: being a man of fortune, he determined not to go before the world without the lights derived from you; and accordingly cancelled all his sheets, and rewrote them, embodying the new considerations suggested by the *Conflict of Laws*. They tell strange stories of Fergusson's absence of mind, some of which I hope to remember to tell you when I get home."

Appendix B

Joseph Story to George Joseph Bell

Cambridge near Boston, June 8, 1839

My dear Sir:

A short time ago I had the pleasure of receiving the volumes on the *Principles of the Law of Scotland*, and the Illustrations thereof, which you were so obliging as to send me. I beg leave to return you my most sincere thanks for this truly acceptable present. These volumes have great intrinsic value, not merely for Scottish lawyers, but for all who cultivate the law as a rational and comprehensive science. They ought to be in the library of every common law Advocate to teach him a just respect for foreign jurisprudence, and to abate somewhat of that exclusive reverence for his own particular department of the profession, which (I am sorry to say) in past times has not added either to the honour or to the wisdom of the profession. For myself, I am free to confess, that imperfect as, from my constant engagements, have been my studies of foreign jurisprudence, and incomplete as have been researches, I have never failed to find a great deal of most important instruction in them, and I have been alternately struck with admiration at the variety of new views suggested by them, and with profound reverence for the depth and vigour of the reasoning of many of the leading authors of that jurisprudence. It was many years ago that my attention was first attracted to the highly cultivated state of jurisprudence in Scotland by the possession of a copy of Erskine's *Institute*; and the liberal use of your own excellent *Commentaries on Commercial Law*. Allow me to express to you my deep obligations to this latter. I have used it constantly in the preparation of all my works upon topics connected with the law of contracts, and especially of commercial law, and I have derived many of the most valuable illustrations from it. I can, therefore, truly say that though I have not a personal acquaintance with you, yet I feel that you are among my most familiar friends.

It has been a matter of no small surprise, as well as of regret, to me, that the Bar of Westminster Hall have not hitherto directed more time to the study of Scottish jurisprudence, and to a more thorough estimate of the great value of your juridical authors. On the subject of international Jurisprudence you have been altogether ahead of them. And I cannot but persuade myself, that in all cases of the conflict of laws they will find, as I have found, the most extensive information and accurate researches in the doctrines and decisions of your country. In the next age I cannot doubt, but that in England and America the writings of Scottish jurists will be as much consulted and as highly esteemed as are now your authors in the general walks of literature. Indeed, I hope that I do not indulge a visionary hope, when I state my belief, that the mutual studies of the jurisprudence of other countries will at no distant time lead the way to vast improvements in the science, and will gradually obliterate the anomalies and peculiarities of each, at least in all those cases, where the same principles and the same interests ought to lead to the same general results, for the benefit of commerce and the intercourse of nations. In such an event you will be looked to as one of the most prominent benefactors.

I have now in the press a work, containing *Commentaries on the Law of Agency*, which will be published in the course of two months. A new edition of my *Commentaries on Equity* is also in the press and will be published in about the same period of time. This new edition has been revised throughout, and contains all the new matter, which appeared to me useful in the recent Reports. I shall send a copy of each of these works as soon as published, with a request, that you will do me the favour to accept them as a mark of my sincere respect. I shall send them (unless some direct opportunity to Edinburgh occurs) through my Boston booksellers to the care of Messrs. Longman Rees & Co., London.

I have the honour to remain with the truest regard and respect Your most obliged servant Joseph Story.

SIR HENRY MAINE AND LAW IN INDIA: 1858–1958

A CENTENARY can often teach a lesson, and the centenary of the preparation of *Ancient Law* draws attention to a feature of its author's work which is usually overlooked. Henry James Sumner Maine (1822–88) believed that his own studies possessed a particularly promising aspect, but in this no one has followed him during these hundred years. Perhaps times are now more propitious, and the work Maine laid down may be taken up again: *quod felix faustumque sit!*

Maine's fame is unique, and it is perhaps for this very reason that no full-length biography has been written of him. The rather jejune *Memoir* by M. E. Grant Duff[1] seemed to depict a spasmodic and at times superficial worker; and one fears lest he may eventually be taken down from his pedestal. Analytical jurisprudence, sociology, legal history, international and comparative law, all studies to which he gave either the initial impetus in this country or a peculiarly powerful stimulus, have progressed happily enough without a critical inquiry into Maine's life, and one tires of seeing great men "debunked." But even a rapid review of his career reveals that Maine owed *Ancient Law*, his subsequent (and resultant) career in India, his chairs at Oxford and Cambridge, and his immense celebrity, in a very significant, if not preponderant, degree, to his "discovering" Indian legal material, and to the timely chance of the Indian Mutiny which put that material in his way. Since Maine's academic testament, as it were, exhorts us to follow his own example, and since no one has in fact done this, the matter deserves more than a passing treatment.

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[1] *Sir Henry Maine. A brief memoir of his life . . . with some of his Indian speeches and minutes . . .*, London, 1892 (cited as *Memoir*).

Maine himself turned to law in an odd way. A classical scholar of the prize-winning class,[2] he seemed just the man to stimulate lethargic undergraduates who hoped to obtain the Cambridge LL.B. by sitting through compulsory lectures given by the Regius Professor of Civil Law.[3] Appointed to that chair in 1847 (at the age of twenty-five) he intended to earn a living at the Bar, and became a student of Lincoln's Inn.[4] As a civilian-to-be one might have expected him to enter Doctors' Commons, but that select and not over-worked body already felt the movements which were about to disperse it. In fact he never acquired a practice, but in 1852 the Inns of Court appointed him their first Reader in Roman Law and Jurisprudence, so that for several years he had the lonely task of teaching both Roman law and the principles of the then almost unreformed English law concurrently. His audiences both at Cambridge and London appreciated and, as it were, demanded an approach which sought to explain the systems with reference to their origins, and which made dull material interesting by constant comparison and analysis. Himself a virtual student in both systems, Maine was excellently placed to discover, and to pass on, the type of reflections which would appeal to a youth trained almost exclusively in the classics and impatient of detailed technicalities. The urge to discover roots common to both systems was, to such a man in such a position, inevitable; and any success was bound to be original, for no one had been similarly placed before. Success, however, was unlikely without reference to other systems of law. The Jewish law, laboured upon during the seventeenth century, was then almost unknown, and taboo still barred the way to a critical investigation of the Pentateuch. Maine subsequently became acquainted with the bare outlines of parts of the Islamic law, though his remarks indicate a superficial interest. But the indigenous Indian system (called the *dharmaśāstra*, or " the science of righteousness ") was known indirectly to barristers practising in the Privy Council, and to the Anglo-Indian community which recruited young barristers from England [5] and sent back judges and administrators to retirement in Britain. India was very much in the news in the first half of the century, and first-hand comments on the customs of Indians were readily available. As early as 1856 Maine wrote an excellent manifesto of his belief in the practical and academic value of Roman law,[6] and therein we find a vague reference to the so-called *Laws of Manu*,[7] which is a very special compilation, the first *ancient* Indian legal work to be translated into English. But his curiosity would hardly have ripened but for the Mutiny.

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[2] Educated at Christ's Hospital and Pembroke College; seven prizes, notably for verse (*Memoir*, p. 7).

[3] D. A. Winstanley, *Early Victorian Cambridge*, Cambridge, 1940, 166. I owe the reference to Professor P. W. Duff.

[4] Adm. June 4, 1847, called 1850; adm. Middle Temple October 4, 1862; Bencher November 21, 1873. I am obliged to the Under Treasurer of Lincoln's Inn for the information that Maine took Chambers (1 Stone Buildings) only in 1852.

Maine was all his life a " journalist." Rapid mastery of a topical controversy always appealed to him more than long-term, continuous and scholarly research.[8] From French politics it was a mere step to an elaborate defence of the East India Company.[9] In reading up the subject he naturally fell into the hands of James Mill, whose disastrous *History* [10] was then captivating all but the " orientalists." He appears to have read very rapidly the *History* by Elphinstone,[11] which deserved credit as a more honest, scholarly and recent publication ; but the impression Mill made on his mind was never shifted by any later reading or experience. Duncan Forbes has pointed out in a valuable article the gross defects in Mill's account of Hindu law and society,[12] and it was through Mill that Maine was introduced to Sir William Jones' translation of Manu, a translation which was more than half a century old and suffered from considerable error in perspective. The importance of this will appear presently. Meanwhile Maine realised, as Mill himself appears to have done, that when the West rediscovered Sanskrit it had rediscovered the Indo-European "race," and the common heritage of its widely sundered branches. The missing legal link was found, and in the year 1857–58 Maine completely refashioned his lectures in London, and the theoretical at once took precedence over the practical.[13] It has already been pointed out that the essence of Maine's subsequent teaching, even after his experience as Law Member of the Governor-General's Council, is already present in *Ancient Law*, which embodies the most important of those lectures, and that the work of his maturer years merely fulfils—more accurately and more substantially, no doubt—the promise which was made in the original lectures.[14] A lifetime's labour did not improve his ideas, though it increased his learning, and the curious ambivalence which is of interest to us was present from the first.

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[5] Such as Whitley Stokes, subsequently Maine's protégé in India and an important author.

[6] " Roman Law and Legal Education," *Cambridge Essays* . . ., London, 1856, pp. 1–29, repr. *Village-Communities*, pp. 330 *et seq*.

[7] At p. 18.

[8] *Memoir*, pp. 11–13, 14 *et seq*.

[9] *Ibid*., pp. 15–16.

[10] *The History of British India* . . ., 2nd ed., London, 1820, Vol. I, pp. 154–269 and 358–405, supplied much that turns up in Maine.

[11] *The History of India by the Hon. Mountstuart Elphinstone*, London, 1841.

[12] " James Mill and India," *Cambridge Journal*, Vol. 5, 1951–52, pp. 19–33.

Now Maine, for all his brilliance, was lazy.[15] He tended to be content with the attractive statement. A close friend admitted that Maine, though a Professor of Civil law, never bothered himself greatly about the Pandects or the Code,[16] and he never burrowed deep into the sources of Indian laws. Yet it was plain, even on his own case, that it would have paid him to do so—and no one had the means so readily at his disposal. As soon as he became the first Corpus Professor of Jurisprudence at Oxford, on the strength no less of his reputation as an expert in Indian laws than of his fame as an original thinker in jurisprudence, he constantly emphasised the crucial importance of the facts of Indian legal development for all those concerned with the history of law or the history of any legal institution, particularly within the Indo-European family. The iteration must have become tiresome.[17] India provided the living museum within which the natural history of law could be examined at first hand.[18] Irish laws before Elizabeth, the English manor, the Highland clan, the Balkan *zadruga*: all became parts of a single mosaic when Indian sources were laid under contribution. Not that India was the *source* of these and other western institutions; but gaps in our legal history could be filled from that vast repertory and even causal links indicated. He was more right than he knew. His unfailing instinct detected that India was capable of satisfying students whose only comparative material had previously been Roman and Teutonic laws, and of stimulating them in ways of which no one had then dreamt. In all his works compiled before he left Oxford in 1877 he repeated that European legal history could not move far without recourse to Indian material.[19] Had Maine used all the books in English then in print on the subject he would have been better informed, and might have rid himself of some errors imbibed from Mill; but that literature was unorganised, diffuse, and despised by some of the Anglo-Indian judges who were obliged to consult it.[20]

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[13] *A. L.* was published in 1861, but the date of drafting is settled by Maine's remarks in his *Dissertations*, pp. 192–193.

[14] See Sir Carleton Allen's Introduction to the World's Classics ed. of *A. L.* He is mistaken in suggesting that the successors of *A. L.* were not half as good. They include *Village-Communities in the East and West . . .*, London, 1871 (cited as *Village-Com.* from the 7th ed., 1907); *The effects of observation of India on Modern European thought*, Rede Lecture, Cambridge, 1875 (cited as *Effects*, from the 7th ed. of *Village-Com.*); *The theory of evidence*, Fortnightly Review, Jan. 1873 (cited as *Theory*, from the same ed. of *Village-Com.*); *The early history of Institutions*, London, 1875 (cited as *Early History* from the 4th ed., 1885); and *Dissertations on early law and custom*, London, 1883 (cited as *Dissertations*).

[15] *Memoir*, pp. 79, 81, 82.

[16] *Ibid.*, p. 80.

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[17] *A. L.* broached the point at pp. 17–18 (ed. of 1906) and see pp. 83, 156 and 272. *Village-Com.*, pp. vii, 9, 13, 15, 22; *Effects*, pp. 211, 215, 220, 221, 224. In *The early history of the property of married women*, Manchester, 1873, repr. *Early History*, pp. 306 *et seq.*, he proclaimed the intellectual value of Hindu law, though it "calls assuredly for no eulogy" (p. 309).

[18] Mill had seen this, but used it as a means of abusing India. For Maine see, *e.g.*, *Early History*, pp. 199–200.

[19] *Early History*, pp. 78, 84, 106–107, 110–112, 187, 226, 233, 383, 388; *Dissertations*, pp. 26, 42, 45, 120–121, 131, 233, 239, 241.

[20] In contrast to the more rational Sir Thomas Strange, Sir Francis Macnaghten's *Considerations on the Hindoo Law* . . ., Serampore, 1824, esp. at pp. i, vi, vii, viii, xi, xiv, and xv, harp on the alleged defects of the system. The British duty, he conceived, was to "defecate the impurity of ages." Maine did not read H. H. Wilson's devastating review of this book in *Quart.Or.Mag.*, Vol. 3, 1835, 171–240 (repr. *Works*, Vol. 5, pp. 1–98).

H. T. Colebrooke and F. W. Ellis, the only Britons to know the Hindu law well, had had to work very hard; both had been dead many years[21]; and they had learnt Sanskrit. This seemed too much for Maine, though he was for several years Vice-Chancellor of Calcutta University and was trained as a linguist.

However, no one disputed the truth of Maine's chief contention in 1877, and criticism of the conclusions he drew from material compared in the new light had been very moderate. His successor, Sir Frederick Pollock, in a most explicit passage, endorsed Maine's beliefs about India, and urged his audience to attend to their special opportunities and responsibilities.[22] But neither he nor his successor, Sir Paul Vinogradoff, did anything to prolong Maine's work in this direction. There were more homely topics to unearth; it was supposed that Maine had covered the ground; the significance of new publications was missed; no Indian legal scholar was qualified to carry on where Maine left off; and college politics extinguished the Corpus chair.[23] If the late Arthur Berriedale Keith had lived twenty years earlier it might have been a happier tale, for he possessed both the Sanskrit and the law. Meanwhile Maine was studied, digested, analysed, and revered, in India, where he is a "set book," as in the United Kingdom. Indian scholars began to deplore his errors, and their learning, generally neglected over here, corrects his biases and fills many of his lacunae.[24]

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[21] For Colebrooke (1765–1837) see *Dict.Nat.Biogr.* F. W. Ellis (c. 1780–1819) had a brilliant career in Madras Presidency.

[22] Maine resigned in 1878. Pollock was elected Fellow of C.C.C. Jan. 31, 1883. His inaugural lecture is significantly entitled *English opportunities and duties in the historical and comparative study of law*, London, 1883. See pp. 22–23.

[23] Vinogradoff's references to Hindu law are quite extraordinarily scanty and are mostly misleading (*e.g.*, *Hist.Jur.*, Oxford, 1920, I, pp. 324–325). But even he asserted his loyalty to Maine's techniques (*The teaching of Sir Henry Maine . . .*, London, 1904). Maine did not transplant historical jurisprudence with him to Cambridge. I owe to Mr. T. H. Aston interesting information about the Corpus chair.

[24] In particular see P. N. Sen, *The general principles of Hindu jurisprudence*, Calcutta, 1918; K. P. Jayaswal, *Manu and Yājñavalkya . . .*, Calcutta, 1930; P. V. Kane, *History of Dharmaśāstra*, 4 Vols., Poona, 1930–53; K. V. Rangaswami Aiyangar, *Rājadharma*, Adyar, 1941; S. Varadachariar, *The Hindu judicial system*, Lucknow, 1946; B. N. Datta, *Hindu law of inheritance*, Calcutta, 1957.

Original Indian legal texts in Sanskrit and translation have appeared along with secondary works, and we are now in an excellent position to review the ground which Maine traversed, and to pass beyond him.[25]

The reader of *Ancient Law* is advised to go on to Maine's later work, but he is entitled to know where Maine was wrong, so far as India is concerned: he will then be able to appreciate how much was sound. Maine's reputation as a pioneer is not a whit lessened for the attacks of Malinowski or Diamond; but his critics, however eminent, have shared an ignorance of Indian material, and Diamond's handling of Manu leaves much to be desired.[26] The admirable works of C. W. Westrup and of Professor G. R. Driver in collaboration with the late Sir John Miles are alike in recognising the utility of Indian sources and in unawareness of the required technique in approaching them.[27] Original research demands a knowledge of Sanskrit (which may be acquired in every quarter of the British Isles); but there is sufficient material in French, German and particularly in English to enable a significant contribution to be made to historical jurisprudence.[28]

We should first deal with Maine's complaints against the Indian system, for these did more perhaps than any other deterrent to discourage work in this field. He said it was stagnant,[29] unpractical,[30] incomplete,[31] and " put off " on a docile public by " interested " compilers,[32] whom he prejudicially dubs " priests." [33] In reality the *dharmaśāstra* was always alive, and moved with the societies that entertained it. Maine cites as instances of stagnation the institution of caste and the rights of women. Caste is now better understood, known to be flexible and sensitive to novel as well as conservative trends. As for women, Maine was misinformed as to the development of their economic rights. In Āryan custom they had no proprietorial right as such ; in Dravidian usage (which Maine towards the end of his life suspected, but never investigated) they were equally proprietors with men, for there appears to have been a community of goods between spouses. In the mixed civilisation of classical times they were allowed both a separate estate in gifts and a limited estate in inherited property.[34] The picture was disturbed during the British period, and Maine could not distinguish between the indigenous legal rules and the " hybrid monstrosity " which the courts made out of them. To proceed: the practicalness of the *śāstra* is not to be denied merely because it was practical in a sense distinct from that apprehended by English lawyers. The study of jurisprudence commenced in India about three millennia ago out of the problems created by the political merging of communities of common cultural heritage but diverging practices on the one hand, and of Āryan or sub-Aryan with Dravidian, Kolarian and other indigenous peoples on the other. Acute worries about the proper relationships between individuals, families, groups, and between human beings and the unseen world, led to attempts to systematise observed usages within a framework provided by cosmological and theological doctrines. As Hinduism developed, certain theories relating to the purpose and function of the individual emerged and these were widely used to justify chosen behaviour-patterns, or particular sets of rules in commercial, criminal and even matrimonial contexts. The Hindus were forced to be comparative jurists, and they were the first. The *śāstra* is a system of theoretical development consisting in a huge literature dating from about 800 B.C. to about A.D. 1830, founded throughout upon observation and regulation of, and ultimate subservience to, actual usages.[35] A man trained in the *dharmaśāstra* at Benares, for example, would be as competent to cope with the legal problems arising amongst partially Hinduised inhabitants of his native valley as the lawyer trained in the Netherlands to cope with problems of handfastings and poindings.

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[25] The *Sacred Books of the East* series and J. Jolly's edition in translation of Nārada appeared while Maine was at Oxford. Since then, *inter alia*, we have had Jolly's Tagore Lectures, and his *Hindu law and custom*, English ed., Calcutta, 1928; J. J. Meyer, *Über das Wesen der altindischen Rechtschriften und ihr Verhältnis zu einander und zu Kauṭilya*, Leipzig, 1927; Gangānātha Jhā, *Hindu law in its sources*, Allahabad, 1930–33; K. V. Rangaswami Aiyangar's editions of Varadarāja's *Vyavahāra-nirṇaya*, Adyar, 1942, of the *Bṛihaspati-smṛiti*, Baroda, 1941, and of Lakshmīdhara's *Kṛityakalpataru*, Baroda, in progr.; the host of texts edited by J. R. Gharpure and in part translated by him; Jhā's translation of the *Vivādachintāmaṇi* of Vāchaspati-misra, Baroda, 1942; and of the same author's *Vyavahārachintāmaṇi* by L. J. Rocher, Ghent, 1956. The whole literature which surrounds the discovery of the secular *Arthaśāstra* of Kauṭilya is post-Maine. For the beginner N. C. Sen-Gupta's *Evolution of ancient Indian law*, Calcutta, 1953, and P. V. Kane, *cit. sup.*, are up-to-date starting-points.

[26] A. S. Diamond, *Primitive Law*, London, 1935, ch. xiii; *id.*, *The evolution of law and order*, London, 1951, *passim* (index: "Manu," "India").

[27] One should not confuse works on Anglo-Hindu law, *e.g.*, J. D. Mayne on *Hindu Law and Usage*, with *dharmaśāstra* sources.

[28] In addition to Maine's own references see those given in Rocher, *cit. sup.*, also the English article in *Zeitschr. f. vgl. Rechtsw.*, Vol. 58, 1956, pp. 199 *et seq.*, and the Bibliography in Derrett, *Hindu law, Past and Present*, Calcutta, 1957.

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[29] *A. L.*, pp. 26, 28, 29, 83 (but *cf. Village-Com.*, p. 47). On caste, pp. 17, 196, and *Village-Com.*, p. 57. On females at length in *The early hist. of the prop. of married w.* (*cit. sup.*), and especially at pp. 322, 326, 341.

[30] *A. L.*, p. 15. Here *Dissertations* is better, but he always believed the system suffered from extreme vagueness: *Memoir*, pp. 162, 232, 244, 420; *Village-Com.*, pp. 37, 50; *Theory*, pp. 297–298. What system does not admit of conflicting opinions?

[31] *A. L.*, p. 379; *Memoir*, p. 232; *Village-Com.*, p. 51; *Theory*, p. 298.

[32] " Tampering ": *A. L.*, pp. 27, 83, 131; *Village-Com.*, pp. 19, 52; *Early History*, pp. 382–383. " Putting-off ": *A. L.*, p. 15. Maligning of Brahmans: *ibid.*, and at p. 131; *Early hist. of prop. of married w.*, pp. 309, 326, 335.

[33] Ellis (in his Lectures at Madras, cited by Gharpure, Vyawahāra, Mayūkha, ii, 1924, p. 185, note 4) Borrodaile, and then Elphinstone, *op. cit.*, I, p. 29, note *h*, pointed out Jones' error, which Maine carelessly copied.

[34] For awareness of importance of amalgamation in Indian legal history: *Dissertations*, pp. 45, 233. For the rights of women see J. R. Gharpure, *Rights of women under the Hindu law*, Bombay, 1943.

Maine's complaint that the *śāstra* is incomplete at once raises the question why he and his colleagues so complacently hastened the importation of English law into India.[36] Whence arose the need for this? But in fact Maine occasionally confutes himself out of his own words. He deplores the lack of treatment of Contract, when half the principal work then available to him dealt with nothing else [37]; of Evidence and Civil Procedure when he admits that Jones praised the latter, and the first words of the principal text on inheritance then in use referred to a preceding chapter devoted to Evidence.[38] The Hindu law of Torts is in fact scattered throughout the chapter on *Vyavahāra* ("litigation"), and if land-tenures are not dealt with exhaustively and separately it is not for want of rules or discussion, if one knows where to find them.[39] Finally Maine attributes base motives to Brahmans, the only compilers of "laws."[40] In fact they were conscientious scholars, working in a social and psychological climate demanding standards different from those to which Maine was accustomed; and he admits that, despite the "awful tyranny" to which he wrongly believed them parties, they did not abuse their position for their own comfort.[41] It was from Jones ultimately that he took the references to "priestcraft." In fact the Hindus could not obtain jurists from any community other than the Brahmans (who were only exceptionally priests in the proper sense), not merely because of the extended education the latter were willing to undergo, but because of their inherited skill in managing complicated sacrifices, and of the necessity that they should be "pure" in order to fulfil their function. This pointed them out in ancient times as the natural arbiters *bonorum morum*, and the only class entitled to distinguish indifferently between conflicting usages.

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[35] The *Sarasvatī-vilāsa* (first pub. 1927) says, "what is observed in practice must be accepted by the jurists." See *B.S.O.A.S.*, Vol. 21, pt. 1, 1958, pp. 61 *et seq.*, at p. 77.

[36] *Memoirs*, pp. 232–288.

[37] *A digest of Hindu law on Contracts and Successions*, by Jagannātha, trans. Colebrooke, Calcutta, 1797, then London, 1801 and Madras 1864.

[38] Colebrooke's translation of the *Mitāksharā* in his *Mitacshara and Dayabhaga, Two treatises on the Hindu law of Inheritance*, many eds.

How many of Maine's characteristic notions stand up to a wider knowledge of Indian legal history? So far as India is concerned his notions of the origins of law are unfounded.[42] The *knowledge* of the rules of law was never the "monopoly" of the "sacerdotal corporation." If they were, in a sense, a religious aristocracy, they were not administrators of law.[43] Administration grew gradually out of advisory appointments and was thus in the hands of Brahmans only in late periods, and then only occasionally. In ancient times the elders of the family, of the village, of a group of villages, of a caste, of a guild, and so on, administered the law applicable within their several jurisdictions, with the mild procedural powers and limited sanctions at their disposal. Where necessary the king was called upon to enforce decrees, and thence he took his appellate powers. In fact the king was still within recent memory a novelty in juridical procedure when the earliest Sanskrit legal text, Gautama's *dharma-sūtra*, was written. Maine incidentally suggested that the fiction of dictation by a deity was a recent development in jurisprudential technique.[44] In fact before the earliest texts were composed it was assumed in India that all learning was obtained by tradition, and must have come from ancestors. The ultimate ancestors of the Brahmans were commemorated as the *Rishis*, or " seers," and to these the Creator was supposed to have expounded the bases of conduct at about the same time as they obtained the Veda, or that corporate body of ancient Indian spiritual and artistic experience which formed the Āryans' and sub-Āryans' only cultural link with their origins. Certainly custom preceded legal formulation, and even at the height of his derivative prestige the king was enjoined to enforce customs so far as might be consistent with the basic principles of the *śāstra*. Maine was right in believing that the king could affect custom, but this he appears to have done by sanctioning spontaneous evolution, rather than by enactment *suo motu*. Numerous examples survive.

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[39] See n. 35, above. Maine's opinion requires correction. Complaints regularly led to compensation *and* fines: Manu VIII, 288; IX, 286; Nārada, VI, 7–8; XI, 28–31; Brihaspati, XVI, 3–5; XVIII, 3, 4, 7, 9; XXII, 13, 18.

[40] See n. 32 above, and *Dissertations*, p. 83, and *cf.* Elphinstone, *op. cit.*, I, 99, 241.

[41] *Ibid.*, p. 82; *cf.* pp. 45–47.

[42] *Roman law and legal education*, p. 18; *A. L.*, ch. 1. *Dissertations*, ch. vi, is more accurate.

[43] *A. L.*, p. 10.

That law had a religious origin, and that religion, morality and law were *inextricably mingled*, is not true for India.[45] Religion assisted the formulation and rationalisation of law; it brought jurisprudence in India to birth; but it affected legal rules chiefly by way of facilitating reforms.[46] If religious and legal matters were treated by the same authors it was because in India " right " and the legally enforceable were, until the twelfth century at the latest, regarded as intimately connected topics, and the distinction between the morally bad act valid in law, on the one hand, and the void act on the other, was a relatively late discovery. The true pre-legal courts flourished up to the British period and are only now withering away: the king's jurisdiction was always limited.[47] Maine rightly points out that a wrong-doer might have to pay a penalty and perform a penance, as in medieval Europe. But there was never a confusion between the king's function of protecting the citizen and the community's sanctions against unpurified sinners. Remnants of the pre-legal era naturally fascinated Maine,[48] since the confusion of the pre-British period had revived ancient methods of distress. But the prominence of the latter should not have caused him to underestimate the value of the traditional processes when they were actually in full vigour. His notion that substantive rights were in some way conveyed through interstices in procedural law[49] is unsubstantiated in India, where formalities, except in the drafting of documents of title,[50] have always been kept to a minimum. The *śāstra* insisted on avoidance of *chala*, technicality that serves as a cover for fraud, and on the presence of *nyāya* or *yukti*, " common sense " or, in a non-technical sense, " equity." Were not ordeals, one may ask, a sign of the indirect and unrealistic? Maine believed so.[51] In fact this common inheritance of a pre-legal and early legal period was highly organised, was not resorted to except in the absence of better proof, nor unless the parties were likely to believe in their efficacy, and reveals a striking psychological appropriateness. Accusations of their fraudulent manipulation are rarely heard.

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[44] *Ibid.*, p. 5.

[45] *Ibid.*, pp. 14, 28, 33, 205; *Memoir*, p. 232. Note that the " spiritual benefit theory " has enjoyed a great scope, but subserviently to legal development, except during the British period.

[46] Marriage: Derrett, *op. cit.*, ch. iv; adoption: *Zeitschr. f. vgl. Rechtsw.*, Vol. 60, 1957, pp. 34 *et seq.*; inheritance: see previous n.

The so-called " patriarchal theory," for which Maine claimed no originality, but which figures so largely in his work, can be over-emphasised in Indian contexts. It is true that simulated kinship played some part in cementing relationships, and that the king was looked upon as a kind of father, just as was the teacher[52]; but the psychological implications of this are only just beginning to be worked out. In reality the Indian civilisation is built on blendings between patrilineal, matrilineal and bilateral customs. The chief was not in fact a common ancestor or a representative of a senior line, and it is only in certain parts and periods that hereditary chiefship went with membership of a particular clan. The superiority of the male line, which Maine felt was emphasised by Indian religion and law,[53] is not to be denied, but it is a survival of Āryan theory which was in practice constantly modified by contact with non-patrilineal peoples. India teaches us how such theories can give ground. Again, Maine's view of corporate life in India, stimulating as it was, must now lead to investigations of the striking fact that in a highly competitive society, guilds—themselves composed of fiercely competitive units—constantly wielded great power in the State. Maine's celebrated theory that property was originally joint and only became individual by degrees[54] would appear to be substantiated by passages in late legal works, written when individuals had to be encouraged not to lean on an inherited and joint estate, and the diverse usages of northern and southern Indian communities came into conflict and required reconciliation. But, as has been repeatedly shown,[55] the theory is entirely unsupported by evidence. Communal villages were always the exception rather than the rule, and both Vedic and classical Hinduism have a partiality for separate property. The reasons why the practical toleration of common tenures should have increased with time have yet to be traced. A minor error of Maine's was his apparently brilliant suggestion that adoption served the purpose of a will.[56] In fact the Hindu adoption prevented free disposition of the family property, and was irrevocable. It gave the adopter no powers which he had not before and took away from him some that he would otherwise have had. Its chief effect was to provide for the welfare of female relations who would otherwise have been thrown on the mercy of collaterals. The testament was unknown to Hindus because they believed that property existed to fulfil duties and that these were all foreseen by the *śāstra*: the scope for *post obit* dispositions was therefore minimal.

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[47] For penance, a large subject, see Kane, *op. cit.*, Vol. iv.

[48] *Early History*, pp. 39–40, 258 *et seq.*, 297 *et seq.*; *Dissertations*, pp. 374 *et seq.*

[49] *Early History*, p. 252.

[50] *Lekhapaddhati*, Baroda, 1925, is a precedent-book, hitherto neglected by jurists. See A. K. Majumdar, *The Chaulukyas of Gujarat*, Bombay, 1956.

[51] *Memoir*, p. 426.

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[52] *A. L.*, pp. 136–137; *Dissertations*, pp. 13 *et seq.*

[53] *Dissertations*, p. 149, *et alibi.*

[54] *A. L.*, pp. 271 *et seq.* *Cf.* Elphinstone, *op. cit.*, I, 43, 130 *et seq.*

[55] B. N. Datta, *op. cit.*, chaps. i and ii, for discussion and refs.

Finally we may review those of Maine's notions which have an unexpended vitality. In *Ancient Law* he suggests that to understand Succession we must look beyond the apparent transfer of dominion from the *propositus* to one or more "successors": the fact of the death must cease to be the centre of interest.[56*] Here Westrup followed him, but with Indian legal literature at our disposal much more can be done. Unwilling to be bound by words, Maine had a knack of cracking legal concepts and revealing their content. He was aware that the Roman law itself sometimes failed to provide apt words,[57] and he realised that in India harm was being done by the importation of English concepts wholesale and by the attempt to force Indian institutions to fit them. His caution in dealing with the concept of Property is commendable,[58] especially since, unknown to him, Indian jurists thought the idea worthy of most elaborate analysis, far superior to anything attempted in the West. His famous theory that there has been a movement from Status to Contract[59] is fully borne out by Indian data. Notwithstanding religious emphasis on the individual soul, Indian history shows that persons have enjoyed rights by custom and at law almost exclusively by virtue of membership of a community or a guild. If Maine at times over-emphasised the effect of metaphysics on behaviour, he was correct in attributing the instances of collective bargaining—what we would now call trade union activity on a very large scale—and the resulting " customary " settling of prices and rents, as examples of closely integrated social adjustment similar to kinship-adjustments.[60] He had much further work to do; for he did not know that the king used in some kingdoms to fix prices, or that rates of interest on loans were nearly always fantastically high, or that, apparently inconsistently, most of the scores of types of mortgages assumed that interest could not increase beyond double the principal amount: these and other items await his successor's explanation. A further example of Maine's nearness to the solution of problems that interested him may be taken from his lengthy consideration of the topics of litigation found in Irish and Indian " codes." Why, he asks, are they placed in a certain order, and why, for example, are Deposits placed near the head of the list?[61] It is evident that the order is decided by the frequency of such disputes in court. In India disputes between persons belonging to different villages would tend to come to the court of the king or of his deputy more frequently than, for example, inheritance cases, which would almost invariably be settled within the family or village. The " codes " and the voluminous commentaries were written from a point of view appropriate to the judicial assessor's seat.

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[56] *A. L.*, pp. 205–206.

[56*] *Ibid.*, p. 201.

[57] *Dissertations*, p. 344.

[58] *Village-Com.*, pp. 158–159, 222.

[59] *A. L.*, p. 174.

Maine was inspired in suspecting[62] that a common substratum of habit lay beneath Hinduism and Christianity, manifesting itself despite the divergence of doctrines. It is very likely that amongst the mental furniture of the ancestors of all branches of the Indo-European family common notions might be traced that have given rise to penance, asceticism, pilgrimage, hermitage and many other institutions having marginal or even integral connections with law.[63] We are hardly beyond the fringes of such investigation on historical and comparative lines, and it is Maine who invites us to proceed. At the bottom of all legal problems lie the feelings congenital in all races and finding expression in *jus*, "right," and that remarkable and, as yet, hardly investigated third notion, *dharma*. Maine was on the point of attempting a definition of this last, when he was aware that his resources failed him. We are differently placed. Valid comparisons may now be made ; a variety of skills may be drawn upon ; and something of value may be learnt.

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[60] *Village-Com.*, pp. 110–111, 182–183, 186, 189–198.

[61] *Dissertations*, pp. 381–383.

[62] *Dissertations*, p. 22 *et alibi*.

[63] *Cf.* material in Kane, *ubi cit.*, with McNeill and Gamer, *Medieval Handbooks of Penance*, New York, 1938.

J. Duncan M. Derrett.

CASES AND COMMENT

1. SCOTTISH CASES

LEGITIMACY—presumptions—onus—competency of blood-tests

Imre v. *Mitchell*, 1959 S.L.T. 13, has been commented on previously. The decision of the First Division has given an opportunity for further discussion of the interesting and rather unusual issues raised by the case. The facts were that B., mother of an illegitimate daughter aged three weeks, married M., and the child was baptised with M.'s name. B. was later divorced by M. and married I. B. now brought an action to have it declared that the daughter was a bastard and not her child by M., and to have the child's tutors and M. ordained to desist from asserting the child was M.'s child, solely with a view to obtaining custody of the child from the father. The Lord Ordinary granted decree as concluded for under both heads (1958 S.L.T. 57).

The First Division accepted that the circumstances were such as to raise a strong presumption in favour of legitimacy *per subsequens matrimonium* and that the proper inference from the previous conduct of parties was that the child was legitimate. (On this point there is interesting reference to the *Decretals* and the canon law.) Indeed, B.'s evidence against legitimacy was in complete contradiction of her own past conduct. The only substantial evidence against legitimacy was the results of certain blood-tests, and these the court held insufficient to discharge the heavy onus on the pursuer, heavy because of the reluctance of the court to stigmatise a child as a bastard and because of the previous course of conduct.

It was also pointed out that M. had not consented to his blood being tested and the majority of the court were of the view that in consequence the evidence thereof was inadmissible. In the result accordingly the Lord Ordinary's interlocutor was recalled and M. was assoilzied. The Division differed from the Lord Ordinary on the acceptance of B.'s testimony, and on the onus of proof, which they regarded as heavier in this case than in the normal case.

The unusual facts of the case make it an instructive one on such points as the application of the maxim *pater est quem nuptiae demonstrant* and the limitations of the principle of legitimation *per subsequens matrimonium*, it being pointed out by Lord Carmont that the latter principle does not apply unless the husband admits paternity or paternity is proved against him in appropriate proceedings.

D. M. W.

JUSTICIARY —evidence— fairness to accused

The *Manuel* trial, which caused such public interest when it took place in 1958, makes its brief appearance in the reports (1959 S.L.T. 23) on two points of evidence raised on appeal, first the question of the admissibility of alleged confessions made by the panel, and secondly, the question whether finding the shoes and body of one of the victims at the place pointed out by the accused amounted to corroboration of his confession of having murdered her. The law on both points has been several times considered by the courts in recent years, particularly in *Chalmers* v. *H.M. Advocate*, 1954 J.C. 66; S.L.T. 177. The view taken by the trial judge on both points, that in the circumstances there had been no unfairness to the accused and that in consequence the confessions were admissible, and that the finding of the shoes and body where he had confessed to having secreted them was corroboration of the confession, was upheld and the appeal dismissed. The decision in this appeal adds nothing to the law but is useful as an example of the obtaining of a confession in circumstances entirely unobjectionable.

D. M. W.

DIVORCE —desertion— "reasonable cause"

X v. *Y*, 1959 S.L.T. (Notes) 9, adds another to the list of difficult cases raising the issue whether, in an action of divorce for desertion, the non-adhering spouse had reasonable cause for non-adherence. In this case the husband (pursuer) had suffered a serious deterioration in mental health and, under the influence of insane delusions, had murdered the younger son of his marriage with the defender. After some years of treatment he recovered and called on the defender to resume married life, which she had declined to do. He now had commenced proceedings for divorce of the defender for desertion. The Lord Ordinary dismissed the action, holding that in the circumstances the wife had had reasonable grounds for non-adherence, in view of the unfortunate consequences to the family of the pursuer's past mental state, and the possibility of recurrence of the cause of the past disaster, a possibility spoken to in evidence. He found himself driven to that view notwithstanding the fact that the pursuer had not been responsible as a voluntary agent for the initial breach in the marriage. This view seems sound in law though it may be more doubtful whether the general social interest would not have favoured a different view.

D. M. W.

DAMAGES—relevance of taxation

Spencer v. *Macmillan's Trs.*, 1959 S.L.T. 41, raised the question of the applicability to Scotland of the principle of *B. T. C.* v. *Gourley* [1956] A.C. 185, in relation to an award of damages for breach of a contract for the purchase of the share capital of a company. In the first place it is clear that *Gourley*, albeit an English decision, is applicable in principle to Scotland also, and also that the principle applies to an award of damages, either *ex contractu* or *ex delicto*, where and in so far as it is a surrogatum for income which would have been taxable if received as such, and yet is not taxable if received in the form of lump sum surrogatum therefor. In the present instance, accordingly, the first problem was whether the damages for breach of the contract to sell all the shares in a limited company were a surrogatum for taxable income or for a non-taxable capital profit. The court decided, in substance, that what the pursuer had lost by not getting the company in terms of the contract for sale and purchase of the shares thereof was loss of a capital asset, not loss of taxable income, and accordingly that the *Gourley* principle had no application. This seems manifestly right: no liability to tax would have arisen merely by the completion of the sale of the company, however profitable that transaction had been; though of course liability would have arisen in so far as the newly acquired asset had been held and worked profitably. But it is implicit in the decision that the *Gourley* principle may enter more and more into problems of damages and it may raise problems of ever-increasing subtlety and complexity. On the other hand it seems undeniably reasonable that, if a sum would have been taxable, the recipient should not get several times as much money merely because he receives it not *in specie* but in the form of damages in lieu.

D. M. W.

HIRE-PURCHASE—conflict of laws—English or Scottish Act applicable

An interesting small point of conflict of laws was raised by *English* v. *Donnelly*, 1959 S.L.T. 2. A Scot in Scotland entered into a hire-purchase agreement with a company registered in England; it was provided that payment of instalments was to be made in England and that English law was to be applicable to the agreement. On default proceedings were taken against the hirer, who in defence pleaded that the provisions of the Scottish Hire-Purchase Act of 1932 had not been complied with and that accordingly the agreement was void. It was held that, notwithstanding the general principle that the validity of a contract is determined by the proper law thereof (which had been plainly indicated to be English law), the provisions of the Scottish Act were mandatory and overrode the implication of the applicability of English law, deducible from the general rule of law plus the express reference to English law. In the result accordingly the agreement was void and the hirer protected.

D. M. W.

2. ENGLISH CASES

MASTER AND SERVANT—negligence—latent defect in tool not discoverable by employers, but patent to manufacturers

The decision of the House of Lords in *Davie* v. *New Merton Board Mills, Ltd., and Others* [1959] 2 W.L.R. 331 is an important milestone on the road of the common law. The facts were briefly that an employee was injured when a piece flew off a metal drift which he was hammering due to the excessive hardness of the metal of the head of the drift. This was due to negligent heat treatment by the manufacturers. The manufacturers had sold the tool to a reputable firm of suppliers who in turn had sold it to the workman's employers. There was no negligence in the employers' system of maintenance or inspection and the defect was accordingly latent to them though it was patent to the manufacturers. The question raised was whether an employer is liable for the negligence of the manufacturer of an article which he has bought, provided he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. The House of Lords have now held that in these circumstances an employer is not liable. In so doing they have upheld the principle of *culpa* although it is a sobering thought that to do so they have had to disregard a Scottish decision of the Second Division, namely, *Donnelly* v. *Glasgow Corporation*, 1953 S.C. 107; S.L.T. 161. Actually the House of Lords purported to overrule the Scottish decision but it is questionable whether they have any power to do so in an English appeal. However, the result of a Scottish appeal raising the same questions cannot now be in doubt: so the point is perhaps somewhat academic. There are, in fact, cases in the courts here which have been expressly held back for the House of Lords' decision.

W. A. E.

PLANNING PERMISSION —ultra vires conditions

In *Fawcett Properties, Ltd.* v. *Buckingham County Council* [1958] 1 W.L.R. 1161 the facts were that the County Council had granted planning permission under the Town and Country Planning Act, 1947, to build a pair of semi-detached cottages subject to the condition that: "the occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by section 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." The owners later sought a declaration that the condition was *ultra vires* the county council. The court upheld this contention and said that "such conditions as they see fit" to impose in terms of section 14 must be such conditions as a local planning authority see fit to impose, having regard to their statutory duties and to local planning considerations. The prescribed categories, however, of permissible occupants in the present case were wider than those which could properly be related to local planning conditions. This decision is of importance as it will also guide the interpretation of the equivalent section of the Town and Country Planning (Scotland) Act, 1947.

W. A. E.

NEGLIGENCE —workman injured on another's premises

The decision of the House of Lords in *Smith* v. *Austin Lifts, Ltd.* [1959] 1 W.L.R. 100 led to a wide divergence of judicial opinion. A fitter was sent by his employers to repair a lift on certain premises. A defective door which he was grasping and testing for handhold after he had climbed up a ladder suddenly gave way causing him to fall and injure himself. It gave the appearance of security because it had been tied up with wire. It was this last factor which enabled the majority of the court to decide that the plaintiff did not fully appreciate the risk and also to draw the inference of fact that the change in the condition of the doors was by the act of the occupiers or their servants. Lord Reid and Lord Denning, however, although they agreed that the occupiers were liable, preferred to do so on the ground that the occupiers had failed in their duty to do all that was reasonable to remove unusual danger of which they had or ought to have had knowledge. It would have been reasonable and indeed easy to repair the door. They were accordingly liable even though no inference could be drawn that it was they who had changed the condition of the door giving a false appearance of security. *London Graving Dock Co., Ltd.* v. *Horton* [1951] A.C. 737 was distinguished because in the present case the workman did not have " full knowledge of the nature and the extent of the danger." The court (Lord Reid dissenting) also held that the employers were in breach of their duty to their workman in failing to see that the place where he was required to work was reasonably safe.

W. A. E.

TRESPASS AND CULPA

Fowler v. *Lanning* [1959] 2 W.L.R. 241 may not be of much interest to the Scottish practitioner but it is of great interest to anyone concerned with tracing the fundamental distinctions in origin between the Scottish and English laws of negligence. In an action based on trespass to the person the plaintiff's statement of claim alleged simply that on a certain date and at a certain place " the defendant shot the plaintiff " at a shooting party. There was no specification of whether the shooting was intentional or negligent or what were the alleged grounds of breach of duty. The defendant " traversed " the allegations of fact by objecting that the statement was bad in law and disclosed no cause of action against him. An order was then made that the point of law be disposed of before the trial of the issues of fact in the action. There then followed a learned argument on the distinction between trespass on the case and trespass *vi et armis* (or trespass to the person). In the latter case the injury to the person must be the direct consequence of the personal act of the defendant. The conclusion drawn by Diplock J. was that trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part. Trespass to the person on the highway does not differ in this respect to trespass to the person in any other place. If negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury, the plaintiff must today be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—such as discharging a gun at a shooting party. Diplock J. said this was merely the converse of what was stated by Lord Macmillan in *Read* v. *J. Lyons & Co.* [1947] A.C. 156, 170, that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. Accordingly, as no negligence was averred the statement of claim in its present form disclosed no cause of action.

This seems a most roundabout way of reaching the principle of *culpa* enunciated by Lord Macmillan in *Read* and of whose different historical antecedents the English judge was obviously unaware.

W. A. E.

TRUST—power of general investment

It is of some interest to note that the Chancery Division has power to confer general powers of investment on trustees under a trust with only limited powers. In *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1958] 3 W.L.R. 701, the applicant society was a statutory body with very limited powers of investment in terms of an Act of Parliament in 1850. Over the years there had been a steady fall in the value of the society's investments which were all of a kind authorised by law for the investment of the trust funds, and a decline in the value of fixed income. On an application for an order that the Society's powers of investment be increased by way of a scheme which set out general powers of investment the court granted the application by virtue of section 57 of the Trustee Act of 1925 which, *inter alia*, provides as follows: " Where in the management or administration of any property vested in trustees any . . . investment . . . is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit." Section 5 of the Trusts (Scotland) Act, 1921, gives a similar discretion to the court but only to grant the powers contained in section 4 where these are at variance with the trust deed. The trust law of Scotland is one of the many branches of our law which needs legislative reform and it is unfortunate that in the cases of the Advocates' Widows' Fund and other funds wider powers of investment have had to be obtained through private Acts of Parliament because there is no public Act available.

W. A. E.

3. PRIVY COUNCIL CASES

INCOME TAX: Assessment set aside.

Gokuldas Ratanji Mandavia v. *Commissioner of Income Tax* ([1959] 2 W.L.R. 5) was an appeal from a judgment of the Court of Appeal for Eastern Africa which had varied, on the appellant's appeal, a decree of the Supreme Court of Kenya which had dismissed the appellant's appeal against assessments to income tax for the years 1943 to 1951. Section 59 of the East African Income Tax (Management) Act, 1952, provided: " The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return of income . . .” By subsection (3): “ Where any person chargeable with tax has not furnished a return within nine months after the year of income, it shall be the duty of every such person notwithstanding that no notice has been served upon such person under subsection (1) to give the Commissioner notice before October 15 in the year following the year of income that he is so chargeable.” By section 71 (1): “ The Commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.” Section 72 provided: “ Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to be charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged . . .”

The appellant had been resident in Kenya since 1921. According to his own statement he approached the Revenue authorities in 1943. That was disputed, but it was not disputed that before 1953 he was not served with notices under section 59, nor did he make returns of his income. In 1950 the appellant gave oral notice to the respondent that he was chargeable in respect of 1950 and the previous eight years. As a result of that interview there was correspondence and information was asked for and some of it given. On May 26, 1953, the appellant was for the first time served with a notice under section 59 (1) of the Act of 1952 requiring him to furnish returns of his income for the years of assessment 1943 to 1953. No previous notice requiring a return having been sent, the “ time allowed ” within section 71 would be the minimum of thirty days in accordance with section 59 (1). The appellant, who at that time was in England, replied asking for time until he could get back to East Africa, which might be by the end of July. The Commissioner replied that he proposed to submit estimated income tax assessments under section 72 of the Act of 1952 for the years 1943 to 1951 inclusive on the basis of figures already submitted. The assessments were made on or before June 18, 1953. The appellant contended that section 72 did not apply until the machinery under section 71 had been put into operation and that the assessments were *ultra vires* in that they were made before the “ time allowed ” by section

71—which was admittedly the thirty days provided by section 59 (1)—had expired.

The Board stated that section 71—the provisions of which were general and mandatory—provided how all original assessments were to be made. Section 72, on the other hand, dealt, *inter alia*, with additional assessments, with cases in which, owing presumably to subsequent information, the Revenue desired to reopen what had, apart from section 72, been settled. Having regard to the wording of section 71 it seemed necessary to restrict the words as to assessing for the first time in section 72 to cases in which, the machinery of section 59 (1) having been operated, no assessment had been made. So far as the taxpayer was concerned, after he had made his return or had had an opportunity of doing so, it was settled that he was under no liability to tax for that year. Subsequent information might lead the Revenue to reopen the matter and decide that he ought to be assessed. Section 72 was concerned with the reopening of cases which had been settled under the normal procedure. That explained the fact that that section contained a prima facie limitation of seven years, whereas section 71 contained no limitation. Before making the assessments therefore, the " time allowed " under section 71 had to elapse. It was common ground that it did not, and accordingly the appeal would be allowed and the assessments set aside.

VENDOR AND PURCHASER: Part of property relet before completion.

Mohamed Haji Abdulla and Another v. *Ghela Manek Shah and Others* ([1959] 2 W.L.R. 12) was an appeal from an order of the Court of Appeal for Eastern Africa dismissing an appeal by the present appellants and allowing a cross-appeal by the respondents from a judgment of the Supreme Court of Kenya. The plaintiffs, the present respondents, claimed specific performance of an agreement in writing, dated December 6, 1951, for the sale by the defendants, the present appellants, to the plaintiffs of certain land and buildings at River Road, Nairobi. The claim for specific performance was made subject to an abatement of the purchase price by reason of an alleged breach of duty or contract by the defendants. On February 16, 1952, before the execution of any conveyance one of the tenants, V. R., surrendered his tenancy of part of the building let to him. On the same day, without consulting the purchasers, the vendors relet the vacated part to a new tenant at the same rent. By the rent restriction legislation in force at the time the rent under the new lease was the maximum rent. Owing to the lack of accommodation the premises with V. R.'s part vacant were worth Shs. 18,000/– more than with the part let. The purchasers claimed that that sum should be deducted from the purchase price or be awarded as damages.

The case depended on the duty which a vendor owed to a purchaser after contract but before completion. By article 11 (b) of the East Africa Order in Council, 1897, the provisions of the Indian Transfer of Property Act, 1882, as amended, before November 27, 1907, were made part of the law of Kenya. Section 54 provided that a contract for the sale of immovable property did not, of itself, create any interest or charge on such property. That negatived the English principle by which a contract for sale conferred an equitable title on the purchaser. Therefore the vendor's obligations, if any, had to be sought elsewhere. They were dealt with in section 55 of the Act, which provided: " 55. In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold—(1) The seller is bound . . . (*e*) between the date of the contract of sale and the delivery of the property to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents."

The vendors submitted that the words " take . . . care of " should be limited to protecting the property from physical deterioration; that they remained the owners and were entitled to relief; that the subject-matter of the contract was a property fully let and that the vendors had always been ready and willing to convey the property fully let; that if the purchasers had desired some right of control or consultation if the whole or part of the premises became vacant, then they should have so stipulated in the contract; that therefore no duty of consultation in the circumstances arose under section 55 (1) (*e*), nor could any such duty be implied. The purchasers submitted in the first place that the words " take . . . care of the property " should be given a wide meaning.

The Board stated that they rejected the submission that those words were restricted to the preservation of the property from physical deterioration. They included care in its management having regard to the interests of the purchaser. On that view the obligations which section 55 (1) (*e*) imposed were substantially those imposed on a vendor by English law. The Court of Appeal had said that the vendor's duties to a purchaser under paragraph (*e*), although he was not a trustee, were the same as they would be if section 15 of the Indian Trusts Act, 1882, were applicable. That section stated: "A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust property." That, said the Board, was substantially the position of a trustee in relation to property under English law. They therefore agreed with the courts below that English principles and authorities were relevant and of assistance. On that basis it seemed plain that the vendors had no right without consultation with the purchaser to diminish the value of the property as it was after the surrender by reletting. The purchasers sought, alternatively, to support the decision of the Court of Appeal on the terms of the contract, and on a general proposition that a purchaser ought always to be consulted with regard to a new letting. In the opinion of the Board it was unnecessary to consider circumstances other than the present, which were covered by section 55 (1) (*e*). The respondents were entitled to a decree of specific performance and an abatement of Shs. 18,000/- from the purchase price. The appeal was accordingly dismissed.

WHARFAGE: Tractors and trailers: "heavy packages."

Kingston Wharves, Ltd. v. *Reynolds Jamaica Mines, Ltd.* ([1959] 2 W.L.R. 40) was an appeal from a judgment of the Court of Appeal of Jamaica, reversing a judgment of the Resident Magistrate's Court, Kingston, and holding that the respondents were entitled to recover £100 in an action which they brought against the appellants for that sum as money had and received by the appellants to the respondents' use. The appellants (the defendants) were wharfingers. The respondents (the plaintiffs) were a bauxite mining company. The respondents imported five Euclid tractors and trailers, which were landed on the appellants' wharves at Kingston. The appellants having demanded £139 6s. 5d. as wharfage, the respondents contended that only £7 17s. 6d. was payable. Anxious to prevent delay in delivery, the respondents paid the sum demanded under protest and sued for the difference between the two sums.

A Euclid tractor was propelled by an internal combustion engine and was mounted on four rubber-tyred wheels. It weighed 18,000 lb. A trailer weighed 17,000 lb. and was mounted on two rubber-tyred wheels. In use it was coupled with a tractor and constructed with a contrivance enabling a load which it carried to be dumped down easily. These articles were imported for transporting bauxite-bearing earth to the respondents' processing plant within the respondents' premises, but not for use on a public road. The Wharfage Law of Jamaica, 1895 (Cap. 281 of the Revised Laws of Jamaica, 1938, Vol. IV, p. 3044, now c. 412 of the 1953 Revised Edition), provided for the landing of goods and the payment of wharfage. Section 12 enacted for the payment of wharfage " according to the rates fixed in one of the Schedules A, B, C or D to this Law . . ." The following items appeared in Schedule A: " Carriages, four wheels, including wheels, each 15s. Carts and carriages of two wheels, including wheels, each 6s." By Law 30 of 1951 the charges were raised to 22s. 6d. and 9s. By section 16 (9): " Any goods not particularly enumerated and set forth in the Schedules A, B, C and D . . . shall be liable to be charged for in proportion to the rates therein fixed: Provided, however, that in respect of machinery and other heavy packages exceeding two tons in weight the rates shall be fixed by special agreement." The respondents contended that the tractors and trailers were " carriages " of four wheels and two wheels respectively, attracting wharfage at 22s. 6d. for each carriage and 9s. for each trailer, totalling £7 17s. 6d. The appellants denied the correctness of that contention. The Resident Magistrate rejected the contention. The Court of Appeal accepted it.

The Board stated that the appellants arrived at a figure of £136 9s. 5d. [limited to £100 so as to give the Resident Magistrate jurisdiction] on the basis of a scheme of charges drawn up in 1944 by an association known as the Shipping Association, which comprised most of the shipping agents and wharfingers in

Jamaica. By the scheme everything weighing one ton and upwards was classed under an item termed " heavy lift." The association was not a body to which the legislature had delegated the power to fix wharfage charges. The appellants sought to sustain the validity of the charges which they had demanded and received on the ground that the goods were not covered by any of the items in the Schedules and consequently came within section 16 (9). They further argued that the goods were " machinery " or " heavy packages " " exceeding two tons in weight "; and that there had been a " special agreement " with regard to them. It was said that the Shipping Association scale of charges was open and notorious to all persons importing goods, that it constituted an offer to importers of goods, and that if the goods were landed on a wharf without a contract expressly relating to the goods the offer of the wharfingers must be deemed to have been accepted by the importer, and that in that way a " special agreement " within the meaning of the subsection would be constituted. At the end of the argument the parties desired, as a matter of agreement, that if the Board came to the conclusion that the articles were " goods not particularly enumerated and set forth in the Schedules," and that they were " machinery " or " heavy packages " within the meaning of section 16 (9), but that there had been no special agreement within the meaning of the subsection, the appellants should be declared entitled to a fair and reasonable charge for the use of their wharf and for the services which they had rendered in respect of the tractors and trailers landed.

Their Lordships had formed the view that the tractors and trailers did not fall for payment of wharfage charges under the item relating to " carriages " in Schedule A; that they were goods " not particularly enumerated and set forth " in the Schedules within the meaning of section 16 (9); and that there had been no " special agreement " within the meaning of the subsection. A " carriage " in its widest sense could be said to be something used for carrying persons, goods or something else. But they did not think that the word " carriage " in the Law should be given that wide meaning having regard to the provisions of the Law and the Schedules thereto, regarded as a whole. But even if it were given that wide meaning they were of opinion that a tractor could not be said to be a carriage. The only thing it carried was a driver, but the purpose for which a tractor was used was not the purpose of carrying a driver. That which carried a driver for the purpose of driving it could not for that sole reason be said to be a carriage. It was unnecessary to decide whether or not the goods were " machinery," because they undoubtedly fell within the term " heavy packages." There was no express agreement what wharfage should be paid for those articles, nor was a tacit agreement to pay the Shipping Association charges for those articles lightly to be inferred. The evidence was not strong enough to support the suggestion that those charges constituted an offer which the respondents must be deemed to have known and tacitly accepted. No special agreement within the meaning of section 16 (9) could be said to have been made. As a consequence of the conclusions of the Board and of the agreement between the parties, the appellants were entitled to a reasonable remuneration for the use of their wharves and for the services which they rendered in respect of the tractors and trailers landed, and the case would be sent back to the Resident Magistrate to assess a fair and reasonable charge.

4. REPORTS

FIFTH REPORT of the Law Reform Committee for Scotland

In this Report the Committee make recommendations pursuant to the proposal of the Royal Commission on Marriage and Divorce that provision should be made on the same lines as the Maintenance Orders (Facilities for Enforcement) Act, 1920, and the Maintenance Orders Act, 1950, to facilitate the enforcement in other Commonwealth countries of orders for aliment made by the Scottish courts and the enforcement in Scotland of orders for maintenance made by the courts of those countries. The 1950 Act provides for the making of a maintenance order in certain circumstances by the court of summary jurisdiction or the sheriff court having jurisdiction where the applicant resides within the United Kingdom, the defender being resident in another country in the United Kingdom, and for the enforcement of such orders throughout the United Kingdom. In order to oppose the application, the defender must go to the court of the applicant's residence. The 1920 Act (which does not apply to Scotland) makes provision for the enforcement within Commonwealth countries having reciprocal legislation of (a) maintenance orders pronounced by a court having jurisdiction over both parties when the order was made and (b) provisional orders pronounced by the court having jurisdiction where the applicant resides which have been confirmed by a court having jurisdiction over the defender. Where the parties reside in different Commonwealth countries to which the Act applies, the court of the applicant's residence cannot grant a final, but only a provisional, order which must be confirmed by the court of the defender's residence before it can be enforced against the defender. The defender can, therefore, oppose confirmation of the order by the court having jurisdiction over him.

The Committee recommend that provision should be made to bring Scotland into line with England and Ireland by legislation on the lines of the provisions of the Act of 1920. The effects of such legislation would be as follows:

(i) Maintenance orders made in Scotland would be enforceable in Commonwealth countries having reciprocal legislation by transmission to these countries of certified copies of the orders.

(ii) Persons in Scotland would be able to obtain provisional maintenance orders in Scotland against persons residing in a Commonwealth country having reciprocal legislation, but confirmation in the country of the defender's residence would be a prerequisite of enforcement there. The defender would receive notice of the application for confirmation to enable him to oppose it.

(iii) Maintenance orders pronounced in Commonwealth countries having reciprocal legislation would be enforceable in Scotland after registration here but such orders would only be registered where the defender—

  (a) is resident within the territorial jurisdiction of the court making the order at the time when the order is made, or

  (b) has been personally cited within that jurisdiction, or,

  (c) in the case of an order made in an action of divorce or judicial separation, is domiciled in the country where the order is made, or

(d) has submitted to the jurisdiction of the court making the order.

(iv) Provisional maintenance orders obtained by persons in Commonwealth countries having reciprocal legislation would be enforceable against persons residing in Scotland after confirmation by the sheriff court having jurisdiction over the defender. On receipt of a certified copy of the provisional maintenance order and of notes of the evidence given in the Commonwealth court, the Sheriff Clerk would enrol the cause for confirmation and would serve notice of the enrolment on the defender to enable him to oppose the confirmation.

(v) Provision would be made for remission of the case by the confirming court to the court which granted the order to take further evidence if the nature of the defence renders that necessary.

(vi) The court in which the order is registered would have power to vary or rescind the order.

(vii) An application for the confirmation in Scotland of a provisional maintenance order made in a Commonwealth country would be treated as a summary application under the Sheriff Courts (Scotland) Act, 1907, but, in all cases where the defender opposed confirmation and led evidence in support of his opposition, that evidence would be recorded and the defender would have a right of appeal to the Sheriff Principal and to the Court of Session.

(viii) Decrees of affiliation and aliment pronounced in Scotland or in a Commonwealth country having reciprocal legislation by a court having jurisdiction over both parties would be mutually enforceable in the same way as other alimentary decrees but it would not be possible to obtain in Scotland a decree or provisional decree of affiliation and aliment against a person furth of Scotland or to enforce in Scotland the equivalent of a decree or provisional decree of affiliation and aliment pronounced by a court furth of Scotland against a person then resident in Scotland. These exceptions are recommended by the Committee on the ground of the difficulties of proof created by parties appearing before courts in different countries.

The Committee have given consideration to the fact that in Scotland an award of aliment must generally be coupled with a decree of adherence or separation, whereas in England, and, it may be, in certain Commonwealth countries, there is no such restriction. Nevertheless they recommend that only defences provided by the law of the Commonwealth country in which the order was granted should be open to the defender opposing the confirmation in Scotland of a provisional maintenance order. This innovation upon Scots law seems to be inevitable if the object of obtaining reciprocity within the Commonwealth in the enforcement of orders already granted is to be attained. The Committee seek to limit the innovation by recommending that a provisional maintenance order made in a Commonwealth country between spouses should not be confirmed in Scotland unless the parties last ordinarily resided together in that Commonwealth country and that, for confirmation in Scotland of other provisional orders, the defender should have resided in the country in which the order was pronounced for not less than two of the five years preceding the application for the order. This limitation would be peculiar to Scotland and the primary object of the Committee's suggestion seems to be to prevent a wife leaving the matrimonial home in Scotland and thereafter obtaining in a Commonwealth country an order for aliment which she could not have obtained if she had remained in Scotland.

One might reasonably anticipate that in some cases the confirming court would have difficulty in resolving a conflict of evidence given by witnesses at opposite ends of the earth, but the Committee are satisfied, after inquiry in England, that this difficulty is more apparent than real. They meet the fact that in some Commonwealth countries corroboration is not required by suggesting that the confirming court in Scotland should apply the rules as to corroboration in force in the country in which the provisional order is made. This may be justified on grounds of reciprocity but it may not be easy for the confirming court to ascertain what these rules are unless some provision is made for this information being passed by the granting court to the confirming court. Another difficulty arises because in England, and probably also in certain Commonwealth countries, a maintenance order made during the subsistence of a marriage may continue after divorce. The Committee recommend that, in the case of provisional maintenance orders pronounced furth of Scotland in favour of one spouse against the other, the dissolution of the marriage before such an order has been confirmed in Scotland should bar confirmation in Scotland and that the confirming court in Scotland should have power then to rescind any provisional maintenance order.

The Committee make no reference to the use which has been made of the 1920 Act procedure but they do refer to having received information as to the hardship caused to wives in Scotland through the lack of facilities for enforcing alimentary decrees in their favour against husbands resident in Commonwealth countries. The Royal Commission suggest that the 1920 Act was not made applicable to Scotland because it involved a breach of the generally accepted principle that a litigant must sue in the court of the defender. This principle finally yielded to expediency within the United Kingdom in 1950 when the Maintenance Orders Act was passed and expediency had clearly dictated the provisions of the Matrimonial Causes (War Marriages) Act, 1944, and the Law Reform (Miscellaneous Provisions) Act, 1949. The principle had, however, previously been set aside within the British Empire on grounds of expediency for a period of one year by the Matrimonial Causes (Dominions Troops) Act, 1919, which for that period conferred jurisdiction in certain consistorial causes upon competent courts in that part of the United Kingdom in which a marriage was contracted during the 1914–18 War by a member of His Majesty's Forces domiciled in any part of the British Empire to which the Act was applied. Actions of separation and aliment, and adherence and aliment, were specifically included in that Act. Good prima facie grounds, therefore, existed at the time for extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to Scotland to enable the Scots wives of Empire troops to have advantages similar to their English counterparts. There does not appear to be any good reason why Scotswomen whose husbands are resident abroad in a Commonwealth country should not now have these advantages. They are not likely to have the benefit of having arrears of aliment collected for them by an officer of court as in England, as the Committee do not recommend such a fundamental change in Scottish procedure for the sole purpose of facilitating the enforcement of provisional maintenance orders made in Commonwealth countries. The absence of an officer with the duty of recovering arrears of aliment might deprive the procedure of much of its efficacy, but the question of whether or not a case can be made for the adoption in Scotland for the recovery of aliment of the English system of collecting officers raises issues which are outwith the scope of this note.

A. M. J.

SIXTH REPORT of the Law Reform Committee for Scotland

The Sixth Report of the Law Reform Committee (Cmnd. 635) contains the Committee's views on the relevance, in a matter of assessment of damages, of the liability of the recipient to income tax. This problem came to the fore with the decision, in *B. T. C.* v. *Gourley* [1956] A.C. 185, that where a person who received damages for personal injury would have suffered income tax and surtax on the sum if and in so far as he had received it as income in the ordinary way, the damages should be reduced to take account of that fact. The principle in *Gourley* has already been widely applied in English cases and has now (*Spencer* v. *Macmillan's Trs.*, 1959 S.L.T. 41) been accepted as applicable to Scotland, and this view the Committee accepts.

While the decision in *Gourley* was greeted with some horror when it was first pronounced, the common sense of the case seems to have won favour, since it appears that a majority of those who submitted their views to the Committee were opposed to alteration of the law. The C.A.s of England and of Scotland, the S.S.C. Society and the Scottish T.U.C., however, recommended change, in the sense either of allowing damages to be awarded without regarding tax liability (which would require legislation to overrule *Gourley*) or of awarding damages gross and then subjecting them to taxation (which would require fiscal legislation). The legislative overruling of *Gourley's* case was suggested both on grounds of principle and of practical difficulties. It is noteworthy that the Board of Inland Revenue stated to the Committee that it had no criticism to offer of the *Gourley* principle, and it did not suggest that damages for loss of income should be subjected to tax: the Revenue in fact neither gains nor loses by the *Gourley* doctrine; the only respect in which it loses is that if the individual had earned £x as income over several years rather than receiving it in a lump sum as damages, the Revenue would have taken tax from it.

As regards the argument for overruling *Gourley* on grounds of principle, the points made to the Committee were that damages for loss of earnings were truly for loss of earning capacity, and that taxation is *res inter alios* as between wrongdoer and injured person. On this matter the Committee thought that *Gourley's* case was in accordance with the basic principle of damages, that damages are given to put the injured party, so far as money can do so, in the position he would have been in if the contract had been fulfilled or the wrong not done to him.

But the practical difficulties of the *Gourley* doctrine were considerable, notably the problems (a) whether the damages would be taxable in the recipient's hands; (b) whether the income for which the damages were surrogatum would have been taxable; (c) the uncertainty of the future level of taxation; (d) the possibility of the recipient's reducing his liability to tax; and (e) the extent to which the recipient's other income should be taken into account. The most serious difficulty about (a) is that any decision by the court would not bind the Crown if not a party to the action, but the Committee appears to be on sound ground in thinking that the area in which the tax position is doubtful is relatively small. The ordinary, and most numerous, claims of damages are for personal injuries or loss of a relative or breach of contract, and are cases where there is certainly no liability to tax. The Committee, however, considered that some provision ought to be made to enable the court to order intimation to the Crown or to invite the Lord Advocate to attend to present argument to the court, so that, in any case of difficulty where a problem of tax liability arose, the views of the Revenue might be before the court and it might be bound by the decision. This is a reasonable suggestion and such a provision in the Rules of Court would be wise.

The remaining practical difficulties are real but not nearly so substantial and in most cases are likely to be of little effect. In conclusion the Committee agrees with the view of the English Law Society that " a rough and ready computation of the tax liability leads to a more just result than is attained by ignoring the tax liability altogether." This is quite in accordance with the whole principle of the law of damages, which is to give fair and reasonable compensation for the loss but not to try to forecast exactly what will or may happen, and not to try to calculate every item to a penny. It might be otherwise if there were rules about giving three years' earnings and so on, but there are no such rules, and one can be sure that juries do not apply rules in awarding damages. In delict and, to some extent, in contract also, damages are a rough and ready estimated equivalent of past and future loss, and a rough and ready allowance for tax is proper. If awarding damages is to become a matter of exact computation then accountants and actuaries are required, not judges and jurors, and allowance must be made for endless possibilities.

The Committee, however, foresaw the possibility of other difficulties emerging and, while recommending that the development of the law should not be interfered with by legislation and, at least in the meantime, be left to judicial decision, thought it desirable to have the matter reconsidered after a period of years, in the light of any developments which have by then taken place. Professor T. B. Smith made a reservation on the Report, being worried over possible further inconveniences and by the consideration that the result of the *Gourley* principle is to benefit the wrongdoer (who has to make less reparation) and to lose the Revenue the tax which they could otherwise have recovered. But the Revenue's loss does not arise because damages have been paid net and not gross, but because damages have been paid at all, in that if income is earned the Revenue takes its share but if income is not earned by reason of an accident and a surrogatum is given in damages therefor the Revenue does not tax the surrogatum. He approves, and there is much to commend on other grounds also, the proposal of the C.A. Institute, that damages should be awarded gross, paid into court and applied in the purchase of an annuity subject to special fiscal provisions. Apart from the tax question this would tend to limit the chance that a sum of damages is merely frittered away.

It is clear that the principle of *Gourley* will gather new applications in the next few years and new difficulties and problems will arise as the courts explore the issues raised and work out the implications of the principle. The wisdom of a fresh look at the problem in a few years is undoubted. Till then it would appear that the Committee's conclusion is acceptable, that the doctrine is consistent with principle and should not give rise to difficulties in many cases, if it is applied in a broad and common-sense manner.

D. M. W.

LISTER v. ROMFORD ICE CO., LTD.

The case of *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* [1957] A.C. 555, caused much interest, comment and criticism, as it passed through the courts. We now have the report of an Inter-Departmental Committee set up by the Minister of Labour and National Service in 1957 to study the implications of the judgments in that case as they might affect relations between employers and workers.

The facts of the case may be recalled: L_1, a lorry driver employed by R., negligently injured his father, L_2, who was his mate and also employed by R. L_2 claimed damages from R. as being vicariously liable for L_1's negligence, and recovered damages and costs. R.'s insurers then, without R.'s consent, sued L_1 to recover the damages and costs they had had to pay L_2, and their claim was sustained in all the courts, it being held (a) that L_1, in injuring L_2, was in breach of an implied term in his contract of employment to take care in his work and not to subject his employers (and their insurers) to claims of damages; and (b) that no implied term could be imported into L_1's contract that the employer would insure him against liability arising in the course of his duties. Further it was indicated, though it was not a matter of decision in the House of Lords, that the same result could be reached by treating R. and L_1 as joint tortfeasors, in which case R. could claim contribution to the extent of 100 per cent. from L_1 under the Law Reform (Married Women and Tortfeasors) Act, 1935. [*Cf.* in Scotland, Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 3 (2).]

The Committee, which was representative of several departments, obtained the views of numerous other departments and interested organisations, including Scottish ones. They point out first in their report that *Lister's* case had not laid down new law but had merely emphasised the personal liability of the wrongdoer, either directly to the injured person or to indemnify his employer if the latter were made vicariously liable. But it is obvious that if there were a serious possibility of employees regularly being called on to pay damages themselves, a difficult situation might arise. The Committee took the view that in practice, in the great majority of cases, the claim is made against the employer, who alone can pay, and in most cases the employer and his insurers have not bothered to try to recoup themselves. If the negligence has amounted to serious or wilful misconduct, the employee has probably been sacked. This view, with which lawyers will concur from their experience, seemed to the Committee to be substantiated by the paucity of reported cases or known instances of claims of indemnity being made on the employee by the employer. Also the Committee reached the conclusion that employers and insurers were both well aware that to make a practice of recovering damages from the individual liable *primo loco* would be likely to have a detrimental effect on good industrial relations.

But certain voluntary action had already been taken, it appears, to reduce this risk by a "gentleman's agreement" among certain members of the British Insurance Association engaged in employers' liability business, undertaking that claims for indemnity would not be made on an employee without the consent of the employer. It was thought, however, in this agreement that the employee should not be freed from responsibility if there was evidence of collusion or wilful misconduct. The British Employers' Confederation had also received assurances that the insurers' rights of subrogation against an employee would not be exercised without the employers' consent. The Committee accordingly did not think that there was much likelihood in practice of claims being made against employees, save in cases of wilful misconduct or suspected fraud, and concluded that the decision in *Lister* had not exposed any serious practical problem. Nevertheless the Committee considered possible kinds of legislation which might be thought desirable at some future date to protect employees from the risk of such action by employers, such as (a) legislation to relieve an employee of any liability for negligence, to third parties and to his employer, a proposal which the Committee rejected as seriously objectionable, as it undoubtedly is, for it would license as much negligence as employees cared to perpetrate; (b) legislation compelling the employer to insure his employees, which the Committee considered would be unenforceable and was a solution previously rejected as impracticable in specific contexts; (c) legislation making employers' liability policies cover employees also in respect of third party risks, which again has practical difficulties and would not help in cases of uninsured employers; and (d) legislation to vary the contract of master and servant to prevent the employer claiming against an employee, and possibly also to require him to indemnify the employee against any liability to third parties. While the Committee regarded this as the least objectionable possibility, it also was open, in their view, to the objection of licensing negligence by employees, and was likely to give rise to many consequential problems.

Accordingly, the Committee reached the view that the best lines for action lay in extension of the " gentleman's agreement," and in encouraging collective bargaining in particular industries directed to obtaining assurances from employers that neither they nor their insurers would seek to recover damages from negligent employees, save in cases of intentional or reckless wrongdoing. This course would be flexible and could be suited to the industry concerned, though it does not help unorganised employees.

The Committee's conclusion on the whole matter is that the decision in *Lister* shows that employers and insurers have rights which, if utilised unreasonably, would prejudice good industrial relations, but that the case has not revealed any practical problem or any need for legislation so long as these rights are not exploited unreasonably, in which case legislation might have to be considered. But there remains open, in the interval, the possibility of voluntary action. It is important to remember, as the Committee noted, that the doctrine of *Lister* is not new, and the fact that no difficulty has arisen in the past suggests that there is no substantial ground to fear for the future. The conclusions are sensible and judicious, and it is satisfactory to have such a balanced appraisal of the implications of the case from outwith the legal system, and a refusal to be stampeded into legislation conferring immunity on employees' negligence.

The practical point does not seem to be expressly mentioned but was doubtless before the Committee, that in most cases a negligent employee is not worth suing, either directly by the injured third party, or by the employer who has been found vicariously responsible for him. One wonders if, in *Lister's* case, the insurers actually recovered anything under their judgment against Lister. That is the main reason why such actions are not commonly brought and are not likely to be brought, and for that reason the current practices in this branch of law seem likely to continue.

D. M. W.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate, Sheriff-Substitute of the Lothians and Peebles

ARTIFICIAL INSEMINATION AND LEGITIMACY.

Mr. G. W. Bartholomew is prompted by *Maclennan* v. *Maclennan*[1] to consider in the *Modern Law Review* for May, 1958, whether the conclusion reached by Lord Wheatley in that case would be followed in England. He thinks that it would, the true criterion of adultery in English law being carnal knowledge, in the same sense as the term is employed by the criminal law. There cannot accordingly be adultery without some degree, however slight, of penetration of the woman by the man, and this condition is not satisfied by the act of artificial insemination.

Mr. Bartholomew goes on to discuss the problem of legitimacy or otherwise of children conceived as a result of artificial insemination. It has not been disputed that a child so conceived, where the semen is provided by the husband, is legitimate. The difficulty arises where the semen is that of some other man, and also perhaps where a mixture of the husband's semen and that of another man is used. It is " fairly clear " in Mr. Bartholomew's opinion, that as the law now stands a child born in the former way at least, namely by A.I.D., is illegitimate, whether or not the husband of the woman consented to the operation. It follows that such a child must be registered as illegitimate and that failure to do so is a criminal offence. At first sight this opinion seems hard to resist, even although adultery on the part of the wife is not involved in the illegitimacy of the child. And yet is the matter so clear after all?

Mr. Bartholomew quotes with approval, and relies on, the views expressed in an article in an American medical journal, to the effect that the concept of legitimacy demands that the child be the actual offspring of the mother's husband, and can no more be rendered legitimate because the husband has consented to the insemination than it could be by the husband's consent to his wife's adultery. Medical experts, however, are not perhaps safe guides on questions of law. It is not the case that, in order to be legitimate, a child must be the actual offspring of its mother's husband. If what is meant, for instance, is that the child must be conceived during the course of the marriage, then it is not true of a child legitimated *per subsequens matrimonium*. Furthermore, a child of a putative marriage is held to be legitimate if even one of the parties to the invalid marriage entered into it bona fide.[2] *Ex hypothesi* such a child is not the actual offspring of the mother's husband. It is only by an arbitrary rule of law that the child is treated as legitimate. Legitimacy therefore, in the legal sense of the word, may be quite a different thing from legitimacy in the medical sense or the ordinary layman's sense.

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[1] 1958 S.L.T. 12.

[2] *Petrie* v. *Ross* (1896) 4 S.L.T. 63; *Smijth* v. *Smijth*, 1918, 1 S.L.T. 156.

It may be said that the child must in these cases at least be the offspring of persons who eventually marry or would marry but for some circumstance that renders their marriage null. But it is arguable that a child born as a result of rape committed upon the mother is legitimate,[3] and indeed it is difficult to see logically why it should not be, if the child of a putative marriage is held to be in the event of the bona fides of a party. The law has always been very reluctant to fix the stigma of illegitimacy on a child, and hence a tendency to extend the meaning of the term " legitimacy " in law beyond its ordinary meaning. Compelling reasons of public policy and morality make it necessary to discriminate between lawful children on the one hand and children born of adultery or illicit sexual intercourse on the other hand. But the discrimination is not one which the law is inclined to push further than it must. The trend of modern legislation, and no doubt public opinion, is to assimilate the positions of legitimate and illegitimate children so far as possible. Now it follows from *Maclennan* v. *Maclennan* that a child born as a result of A.I.D. is not the product of adultery, nor of illicit sexual intercourse, nor of sexual intercourse at all. Why then should the law be obliged to regard it as illegitimate?

Mr. Bartholomew and those who agree with his view do not perhaps make sufficient allowance for the entirely novel form of procreation which A.I. presents, whether A.I.H. or A.I.D., and whether or not in the latter case with the husband's consent. Judicial decisions and academic opinions on the subject of legitimacy before the invention of A.I. assumed without question that a child could not be born without previous sexual intercourse. The only problem was whether the intercourse was such as the law allowed or approved or was not. In the one case the child was legitimate, in the other illegitimate except in special circumstances, as where the natural parents married after the birth of the child. The quite different situation introduced by A.I.D. was never contemplated, namely one where a child is born in a manner not disapproved by law and yet otherwise than as the result of sexual intercourse between married persons. So far as authority exists, it is rather in favour of the view that the lawful or unlawful mode of procreation is the proper test of legitimacy, not whether biologically or genetically the child is the authentic offspring of a particular man and a particular woman. Thus Fraser defines " legitimacy " as the status of a party who has been born in a lawful manner, that is in a manner approved by the law.[4] Again, the reason he gives for treating the children of a putative marriage as legitimate is that the law does not condemn the association in the same way as it does fornication, and consequently it would be inexpedient and cruel to extend the punishment of bastardy to the issue.[5]

It seems to follow that a child born of A.I. will never have the status of an illegitimate child, even though its mother is unmarried, because it was not conceived as a result of adultery or fornication. For practical purposes, however, no doubt the important, and difficult, question is whether a child born as a result of A.I.D. to a married woman, assuming it is legitimate, is the legitimate child of the woman's husband or whether *quoad* the latter it is a stranger.

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[3] Fraser on *Parent and Child*, 3rd ed., 36.

[4] *Parent and Child*, 3rd ed., p. 1.

[5] *Ibid.*, p. 27.

If the word "father" can mean only the natural father, then, of course, the husband cannot be the father of a child born by A.I.D. But in law "father" is not necessarily so to be defined. For legal purposes the husband of a woman is presumed to be the father of her child. The presumption may be rebutted, but until and unless the contrary is proved he is the father in the eyes of the law. The presumption is a strong one, so strong that at one time it could only be rebutted by direct evidence of physical impossibility that the husband could be the father.[6] The problem, therefore, is can the presumption *pater est* be overcome by evidence that the child was conceived as a result of A.I.D.?

The answer would seem to depend on what is the real basis of the rule that allows the presumption in favour of paternity to be displaced. Is the fact that the husband is shown not to be the natural father of the child sufficient in itself, or is it only material because it is evidence of misconduct on the part of the mother? If the latter is correct, then the presumption *pater est* is not to be rebutted by proof that the child was born as a result of A.I.D., but only that the wife has been guilty of adultery. It may be thought to be the better view, since the law is interested, not in solving a biological puzzle, but in protecting the interests of children born during the subsistence of marriage on the one hand and the interests of society on the other hand.

The argument that the presumption *pater est* cannot be overcome by evidence that a child was born by means of A.I.D. is far-reaching, since it leads to the conclusion that the husband of a woman who has given birth to a child in this way is always to be considered its father, even if he was separated from his wife at the time of conception; or was incapable of procreation, and whether he consented to A.I. or not. Some of the consequences of such a rule would certainly be anomalous. No more anomalous, however, than a rule which would bastardise a child conceived by A.I.D. with the consent of the woman's husband. If, as has been recommended by the Royal Commission on Marriage and Divorce, A.I.D. without the husband's consent becomes a ground for divorce, or if it were made a criminal offence, a court might decide the matter of legitimacy or illegitimacy according to whether consent was given or not. But it could scarcely do so as things are, there being nothing unlawful in A.I.D. at present with or without the husband's consent.

It does not appear that in a case of A.I.D. the natural father has any better claim to be regarded in law as the parent of the child than has the woman's husband. Indeed the term "natural father" is inappropriate to the donor, or vendor, of the semen. Genetically it no doubt makes sense to call him the father. From any other point of view, it makes no sense at all. He will probably never see or hear of the child or its mother and is only connected with it, although he is a *sine qua non* of its existence, in a remote and indirect fashion. The doctor who carries out the operation on the woman might just about as well be called the father of the child. If the child can be supposed to have a father at all, suggests M. Stoyanovitch, writing in the *Revue Internationale de Droit Comparé*,[6a] he is a father composed of three persons, the husband who gives his consent to the operation, the doctor who performs it, and, last and least, the man who provides the seminal substance.

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[6] Erskine, Instit., I, vi, 49.

According to M. Stoyanovitch, the majority of writers who have considered the question in France are of opinion that a married woman who conceives by A.I.D., whether or not her husband consents, is guilty of adultery. He does not agree with the majority, and further thinks that a child so born is entitled to the protection of the presumption *pater est*, subject however to a non-consenting husband's right to divorce his wife on the ground of grave injury and to repudiate the child under the Civil Code. It is interesting to note that in France the presumption *pater est* cannot be overcome by proof of impotence of the husband or of adultery by the wife, unless the birth of the child was concealed from the husband. Apart from this exception it requires, as our law used to, non-access or other physical impossibility that the husband could be the father.

Evidently, there are strong arguments for legislation on this matter, in order to make A.I.D. permissible (and it would be an unwarrantable interference with private liberties if it were not permissible subject to safeguards) only with the husband's consent in the case of a married woman. Presumably legislation for this purpose would also clear away any uncertainty as to the legitimate status of children born in such a way. But it would require careful consideration, or the consequence might be to make the concept of legitimacy narrower rather than wider.

CRIME AND REPARATION.

The penal law of ancient communities, said Maine,[7] is not the law of crime but the law of wrong. The person injured proceeds against the wrongdoer by an ordinary civil action and recovers compensation in the shape of money damages if he succeeds. This statement is open to criticism, so far as English law is concerned.[8] But it is conceded that most wrongs in early times were redressed at the instance of and for the benefit of private persons, that being the only effective way in which wrongs could be redressed. The practice of private prosecutions, less obsolete in other countries, for example, England and France, than in Scotland, is a survival from those times. There was indeed, no clear distinction drawn between public and private wrongs. Professor D. M. Walker remarks that many of the matters which formerly grounded actions of spuilzie, by far the most persistent form of action in early modern Scots law, particularly in the sixteenth and seventeenth centuries, would now be criminally prosecuted as theft, reset, or robbery.[9]

In the course of the past two centuries the separation of criminal from civil proceedings has become rigid and complete, too much so it may be considered. The interest of the State in repressing crime is distinct from the interest of the individual in securing compensation for a wrong suffered by him. But there is a close relationship between them. The State is also interested, as the institution of civil courts shows, in settling disputes between private persons. If it can punish the offender and satisfy the person aggrieved by the offence at one stroke, so much the better. From the latter's point of view the advantage is obvious. But, as a recent White Paper on penal methods points out, modern criminal law has almost completely lost sight of the concept of personal reparation by the offender to the victim. "The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasises the reformative aspects of punishment. Indeed, in the public mind the interests of the offender may not infrequently seem to be placed before those of his victim. This is certainly not the correct emphasis."[10] The White Paper goes on to suggest that the moral basis of the penal system might be strengthened, crime more efficiently repressed, and the redemptive value of punishment to the offender greater, if the need to make personal reparation were brought home to him.

[6a] 1956, pp. 264 *et seq*.

[7] *Ancient Law*, 5th ed., p. 370.

[8] See Potter, *Historical Introduction to English Law*, 4th ed., p. 346.

[9] " The Development of Reparation " (1952) 64 Jur.Rev. 101, at 133.

By our law, like that of England, a conviction on a criminal charge cannot be used generally as evidence in a civil action arising out of the criminal offence, nor, contrary to the practice in Continental countries, can a claim for damages be pursued before a criminal court. In France, for example, a person who has suffered injury or damage as a result of a criminal act may sue the offender at his option either in the criminal court in which the offender is prosecuted, or in a civil court, although once his choice has been made it cannot be altered. If he chooses to join in the criminal proceedings, the criminal court decides both the questions of the criminal liability of the accused and the civil law obligation to pay damages, or to make compensation in some other way, to the victim. This is apparently the usual course to take, where the choice exists, owing to the delays of French civil procedure and the rule that if concurrent criminal and civil proceedings are being taken on the same grounds the civil action is suspended until the criminal court has come to its decision.

Mr. C. Howard discusses in the *Modern Law Review* for July, 1958, a variety of problems that have arisen in France from the procedure referred to, but he does not give details of how it works in practice, which is a pity. In some other Continental countries representation of injured parties is included among the duties of the public prosecutor in appropriate cases. The absence of such provisions in France has been made the subject of criticism on a number of grounds. It is maintained that an injured party may fail for one reason or another to intervene in time in the criminal proceedings, or be debarred by the expense of doing so, and that thereby injustice may occur. If he does not exercise his right the criminal court will be deprived of the opportunity of considering the criminal sentence and the civil damages as a whole from the point of view of the offender, which is one of the main advantages the procedure affords in comparison with our practice of keeping criminal and civil cases in separate compartments. One difficulty, for which no solution has been found in any country, is to ensure that the injured party if his claim is upheld will be able to enforce the judgment against the offender, who will, of course, frequently be impecunious. The suggestion has been made that it is the duty of the State to prevent crime, and consequently when it fails to do so an obligation lies upon it to repair any injury or loss to a private person caused by the failure. But it does not appear that the principle has anywhere been accepted, or at any rate suitable methods of applying it thought out.

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[10] "Penal Practice in a Changing Society" (Cmnd. 645; 1959).

It may, however, prove to be a fertile suggestion in the future. The late Miss Margery Fry put forward a project for compensating the victims of criminal violence, at State expense, by an extension of the industrial injuries insurance system, making use of existing administrative machinery and providing a standardised scale of benefits, more generous than under ordinary national insurance. This proposal has been taken seriously by the Home Office, as the White Paper mentioned above discloses, and an official working party has been set up to examine it in detail.

The idea of industrial injuries insurance is that an employee who is injured or disabled as a result of an accident at work, however caused, is to receive a fixed weekly sum as benefit while unable to work or as pension on account of, and in proportion to, disablement from work. It is not a substitute for claims to compensation by employees against negligent employers, who may have to pay damages according to the degree of fault and the extent of the injury without restriction of amount. It hardly seems appropriate that persons injured in consequence of a criminal offence should be compensated on a fixed scale according to the number of days or weeks they are unfit for work or the degree of disablement. And yet how would the scheme work unless some standard tests based on the nature of the injury were applied without regard to the particular circumstances of the injured person or of the crime? Should an elderly shopkeeper who is knocked on the head and robbed be treated in the same way as a participant in a drunken brawl, because the injuries are the same? Moreover, would it be logical, or equitable, to pay compensation for injury due to violence, that is to say, personal injury inflicted wilfully or recklessly and not for a similar injury committed by way of breach of a statutory duty to take care, or, again, to distinguish personal injury from injury or damage to property? The shopkeeper who is assaulted and robbed may suffer much more from the robbery than from the assault. It is true that property owners are often privately insured. But one may insure also against personal injury. The better way surely, rather than by attempting to compensate the victim of a criminal offence through a system of State insurance, would be to enable a criminal court, as in Continental countries, to order an offender to pay damages in addition to, or in lieu of, punishment, and further, to ensure that the victim did not go without a remedy in the event of the offender not having the means to pay.

Criminal courts do, in fact, at present possess means to some extent of compelling an offender to compensate the victim. Thus it is a common practice, especially in the case of certain types of fraud, for a court to defer sentence in order to give the offender an opportunity to repay a sum obtained dishonestly. Again, when making a probation order the court may insert a requirement that the probationer should make reparation for injury or loss for which he is responsible. These powers are useful but limited. Deferred sentence and probation are alternatives to imprisonment and fine, and so reparation cannot be ordered in addition to these punishments. The injured party has no right to intervene or to prove what injury he has sustained, and the court has no power to hear evidence as to damages claimed by him. He may not even have notice that the criminal case is being dealt with. The court, therefore, can often have no adequate grounds for assessing the amount that the offender ought to repay, and the injured party not only has no right but may have no opportunity to establish his claim.

There seems to be no basis in authority for the practice of criminal courts of deferring sentence for repayment to the victim, but probably it is too well-entrenched to be disturbed. Nor is it entirely free sometimes from doubt whether a condition of reparation in a probation order is a requirement necessary for securing the good conduct of the offender or preventing a repetition of the offence.[11]

In England the position is clearer, since under the Criminal Justice Act, 1948,[12] express power is conferred on a court, when making a probation order or granting conditional or absolute discharge, to order the offender to pay such damages for injury or compensation for loss as it thinks reasonable, subject to a limit of £100 in the case of a court of summary jurisdiction. Again, the Criminal Administration Act, 1914,[13] provides that where a person wilfully or maliciously damages property he may be ordered to pay reasonable compensation to an aggrieved party, in addition to punishment. English courts also have wider, or more explicit, powers than Scottish courts in the way of ordering the restoration to the owner of stolen property and granting expenses to accused persons, including a power to order payment of the costs of the defence out of public funds in the event of an acquittal.[14]

The existing powers of courts of law in these matters might well be clarified and extended, so that offenders, apart from any penalty imposed, could be compelled to pay suitable compensation wherever injury or loss has resulted from the offence. In order to make the power effective, however, it would be necessary to go further and provide that persons having claims to compensation should have the right as well as the opportunity to intervene between conviction and sentence, and to bring before the court evidence of injury or loss sustained by them. Above all, it is no use giving the victim a right to receive compensation, if in practice he is unable to recover anything because the offender has no means of paying.

It does not seem altogether unreasonable that courts should be given the power, where it appeared that compensation ought to be paid by an offender but he was unlikely, owing to lack of means, to satisfy a claim for payment, to order compensation to be paid out of public funds, the Crown being subrogated to the rights of the injured party against the offender. The State, in other words, should guarantee the victims of crime against loss. It might do so, we can suppose, out of the fines levied by criminal courts, surely a very proper way of disposing of them.

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[11] See Criminal Justice (Scotland) Act, 1949, s. 2 (3).

[12] s. 11 (2).

[13] s. 14 (a section which is excluded from the application of the Act to Scotland).

[14] See Costs in Criminal Cases Act, 1952.

It would only be equitable if so, that a similar power to order compensation out of public funds should be available where a court was satisfied on the application of an aggrieved party that a criminal offence had been committed but no prosecution was instituted, because the offender could not be discovered or for some other reason, or there was an acquittal.

No doubt, if criminal courts were given such additional powers, it would be right to impose certain restrictions on their exercise, and in particular a maximum sum to be paid by an offender or out of public funds, at any rate by summary courts, might have to be fixed. It would probably be undesirable for an injured party to be obliged to intervene in criminal proceedings if he desired compensation. He would be free to seek a remedy by a civil action, and the criminal court also, perhaps, might be entitled to refuse to make an order for compensation where the case could more suitably be dealt with by a civil court, on account for example of complicated questions of fact or law being involved.

SUMMARIES

By S. G. KERMACK, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

COMMON LAW AND STATUTE

In the *Canadian Bar Review*, September, 1958, Mr. D. W. M. Waters of University College, London, examines " The Concept of Market in the Sale of Goods," and in the same number Mr. Ian F. G. Baxter follows the development of the Law of Domestic Relations in the past ten years.

The *Modern Law Review*, January, 1959, has an article by Mr. A. H. Hudson of Birmingham University, on " Industry as a Riparian Use," and another by Mr. Stoljar, of the Australian National University, discussing the unjust enrichment problem raised in the Birkbeck Bank depositors case in 1912.

Sir Kenneth Swan, Q.C., in the *Law Quarterly Review*, January, 1959, discusses the intended results of the provision introduced by the 1949 Patents Act to govern the possible division between employer and employee of rights in an invention.

CONFLICT OF LAWS

In the *Law Quarterly Review*, October, 1958, Mr. B. D. Inglis contrasts the approach by our courts to the questions of *renvoi* and classification with the elaborate theories of the academic subject of Conflict.

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Praise for the State Constitution of Alaska is given in an article in the *American Bar Association Journal*, December, 1958.

Mr. H. V. Wiseman, of Leeds University, writes on his own subject, " The Cabinet in the Commonwealth," in *Public Law*, Winter, 1958. Mr. I. Zamir, of Jerusalem University, sets out in the same number the advantages of the Declaratory Judgment as against the Prerogative Orders.

In the *Modern Law Review*, January, 1959, the " Constitution of the Fifth French Republic " is analysed by Dorothy Pickles.

CRIMINAL LAW

The *Canadian Bar Journal*, October, 1958, prints two practical addresses on the " Problem of Sentencing " by B. W. Hopkins, Q.C., and on " Uniform Application of the Principles of Punishment " by B. Common, Q.C.

The *Canadian Bar Review*, December, 1958, shows the development of Criminal Law there for the last ten years by the pen of Mr. Alan W. Merrett.

ENGLISH LAW

The *Law Quarterly Review*, January, 1959, contains an article by Master A. J. Diamond, LL.D., on the Summons for Directions Rules in force; as also one on the Doctrine of Failure of Consideration.

FOREIGN AND COMPARATIVE LAW

Professor Ficker, of Mayence, looks, in the *Revue Internationale de Droit Comparé*, October–December, 1958, at the study of Comparative Law in Germany. In the same *Review* Dr. Gustaf Petrén gives an interesting picture of current constitutional problems in the Scandinavian countries. Also might be noted an article by Dr. Dorantès-Famargo on an institution of Mexican (and Spanish) Law, " concurso civil," a process regarding non-commercial debtors, a sort of notour bankruptcy.

INTERNATIONAL LAW

" The Geneva Conference on the Law of the Sea " naturally forms a leading subject in the *American Journal of International Law*, October, 1958, being reviewed by Arthur H. Dean, the chairman of the United States Delegation to it. Related topics are " the Continental Shelf " by Marjorie M. Whiteman, and the " Status of the Gulf of Aqaba " by Charles B. Selak, Jr. A study of the Soviet view of the sources of International Law, particularly Treaties, is also included in the *Journal*.

JUDICIAL ADMINISTRATION

Printing costs in appeals in America are considered as a denial of justice in the *New York University Law Review*, November, 1958.

JURISPRUDENCE

In the *Modern Law Review*, November, 1958, Mr. A. G. Chloros, of the University College of Wales, in an article entitled "What is Natural Law?" considers how it may be integrated in the teaching of jurisprudence.

PROCEDURE

Mr. D. M. Gordon, Q.C., in the *Law Quarterly Review*, October, 1958, begins an examination of the insufficiently studied subject of the effect of reversal of judgment on acts done before such reversal.

SCOTS LAW

In the *Conveyancing Review*, November, 1958, Professor Halliday advances a plea for Conveyancing Reform, and Mr. A. G. M. Duncan, W.S., writes on "Maintenance of Tenement Roofs in Conveyancing Practice."

Periodicals also received: *Jus* (Milan), *La Justicia*, *Connecticut Bar Journal*, *The Western Political Quarterly*, *Revista del Foro* (Lima), *British Tax Review*, *Documentation Juridique Étrangère* (Brussels), *Textes Législatifs Étrangers* (Brussels), *Oklahoma Law Review*.

RECENT LITERATURE

Selected Papers, 1922–1954, of The Rt. Hon. Lord Cooper of Culross. 1957. Edinburgh: Oliver & Boyd. 25s. net.

Everyone who came in contact with the late Lord Cooper recognised his great qualities, and this volume of his Selected Papers, with a biography and a note of his contribution to Scots Law, is a *monumentum aere perennius.*

Those who knew him in the Parliament House marvelled at the extraordinary ability and diligence which enabled him to take advantage of the opportunities provided by his connection with the busiest litigating firm in Edinburgh. The secret of his success was concentration on his supreme objective in life, which was to become professionally outstanding. He allowed no other considerations to stand in the way of this. Thus his experience of criminal law was modest until he became Lord Justice-Clerk in 1941, though curiously four of his five judgments here reproduced are from the *Justiciary Cases.* Politics he took in his stride as a necessary step to high judicial office, and scholarship was a luxury he only indulged in after his success was irrevocably established. A mere six of the thirty-one papers are prior in date to his Solicitor-Generalship in 1935. He was thus a careerist in the best sense of the word, a man who realised that, if he was to have a dominant influence for good, he must first attain a dominant position.

As an adviser he acquired an outstanding knowledge of law. As a pleader he relied on a beautifully logical presentation of his argument, neatly supported by authority; but he did not resort much to the art of persuasion, sometimes described as repeating the same proposition in another form. If his frontal attack seemed no painful inch to gain, he was too businesslike to wait for his doctrine to penetrate far back through creeks and inlets making, but simply repeated his argument, generally with success, in the court above.

If these early aspects of his life in Abercromby Place are perhaps not sufficiently reflected in this book, it gives a good picture of his mature talents though his judgments *in civilibus* are not sufficiently reproduced. Without a fair sample of these the reader cannot appreciate how he combined dignity with urbanity, and what a pleasure it was to appear before him. How his judgments will stand in the next generation remains to be seen. Some, perhaps, were based on rather special pleading and were reversed because of that, though they may have reached a right conclusion (*e.g., Anderson* v. *Lambie*, 1953 S.C. 94; S.L.T. 82; 1954 S.C.(H.L.) 43; S.L.T. 73; *Ross's J.F.* v. *Martin*, 1954 S.C. 18; S.L.T. 49; 1955 S.C.(H.L.) 56; S.L.T. 117).

But the fact that Lord Cooper was never frightened of the House of Lords was symptomatic of his cast of mind. The printing as an appendix of the Declaration of Arbroath is, indeed, appropriate, and throughout the " E II R " case he never forgot who beheaded Mary, Queen of Scots. As Professor T. B. Smith points out (p. xxxiii) he regularly challenged the assumption often made in Westminster, that "the principles of Scottish and English law on the matter *sub judice* were identical." This was particularly so in regard to reparation (pp. xliii–xlv). The importation from England of civil jury trial did not find favour in his eyes.

But the main impact of these Papers lies in their illustration of the diverse interests of the master mind. Legal education, accountancy, institutional writers, law reform, consequential damages, constitutional law, medieval population, comparative law, Scots legal history, administrative justice, early Scots law libraries, historical atlases, and astronomical eclipses, all came within his ken.

If he had been spared ten more years of life he would have written the classical history of Scots law, and might possibly at that stage of his career have regarded this as his greatest achievement.

H. McK.

The Philosophy of Law in Historical Perspective. By CARL JOACHIM FRIEDRICH. 1958. Chicago: The University of Chicago Press. U.S. $4.75.

Carl J. Friedrich, the Eaton Professor of the Science of Government at Harvard, is one of those many émigrés from Continental Europe who in this century have adapted themselves to a new environment in the English-speaking world, and in so doing have enriched the country of their adoption. Hitherto, his writings have been concentrated largely in the fields of Political Science and Constitutional Law, but in the present work he essays a historical survey of jurisprudential thought. Though avowedly an expanded version of the volume he contributed in 1955 to that monument of German scholarship, the *Enzyklopädie der Rechts- und Staatswissenschaft*, it bears none of the stigmata of translation and in fact has a shining lucidity of expression, which is too often conspicuously absent in works of this nature.

The structural pattern which Dr. Friedrich has set for himself is one that in less skilled hands might easily lead to superficiality and glib judgments; for in a series of sketches, sometimes no more than half a dozen pages in length, he attempts to give a chronological account of human thought on the nature of law, from the prophets of the Old Testament to the critics and apologists of the totalitarian state of the present day. Nor is it mere reportage, but critical analysis which grows more searching as modern controversies are reached. But conciseness has not been achieved at the expense of depth; these vignettes presume that the reader will draw on a certain background knowledge to fill out the picture. Moreover, by adroit juxtaposition of writers and schools that stand apart in character or point of time, illuminating comparisons are often made. Thus, Hobbes is linked to the nineteenth-century utilitarians, Rousseau is partnered by Kant and Hegel by Savigny.

Professor Friedrich has chosen to conclude his study with a section entitled "Systematic Analysis" which, it must be confessed, follows somewhat awkwardly on the historical portion of the text. It scarcely fulfils the promise held out in the title of the book, for it is not a drawing together of threads from the historical canvas, and contains little or no reference to the earlier portion; nor is it a discussion of all the main problems posed in legal philosophy; rather it seems an excursus on those of them which hold most interest for the political scientist. Certainly, the central question of the relationship of law to justice is touched upon and the author, in a passage that might well have been expanded, adopts a moderate position that sees justice as " a state toward which the law is oriented as an approximation " (p. 191). But it is in the context of primarily political questions, such as the role of constitutions and the meaning of authority, that he chooses to develop this theme. The author's final words sum up his mildly empirical attitude to the phenomenon of law: " just law is a system of reasonable rules which are grounded in the common experience of man, which seek to realise justice, which are created with the participation of all the members of the legal community on the basis of a constitution, and which rest upon the continuous common effort of these members "—a thesis, one would think, which cries out for explicit illustration from the earlier portion of the work.

In common with literary anthologies, works of this panoramic nature must risk the criticism that the personalities they include or omit do not coincide with the reviewer's own choice. Professor Friedrich has not given much ground for complaint on this score. Nevertheless, it is astonishing that Pound and the American sociologists (being insufficiently philosophical?) should rate no more than a couple of lines, while Leonard Nelson, an original but not notably influential German jurist of the inter-war years, merits four pages. Both appear in a chapter headed " The Revival of Natural Law in Europe and America "—which, in view of these and other contents, can only be described as a misnomer. On the other hand, it is good to see that that Janus-like figure, " the judicious Hooker," who carried forward a modified scholasticism into post-Reformation England, receives a recognition that he is rarely accorded in legal works.

On many of Professor Friedrich's judgments there will be room for more than one opinion, as he is generally ready to admit. It may be questioned, for example, whether " the Marxist challenge " has really done much to stimulate sociological and anthropological research (p. 150). It seems a harsh judgment in an otherwise convincing critique of Kelsen's work to say that it involves " a glorification of the State " (p. 173). It may be, too, that the author underestimates recent work indicating how much Austin owed to Bentham (p. 98). Possibly the compression inevitable in a work such as this has created impressions which the author did not intend to convey; but when, in his discussion of St. Thomas, he treats of his definition of human law and the possibility of revolt against it, without delineating the setting of " higher law " in which it rests, succinctness seems to be defeating its own ends. In a book addressed to English-speaking readers some reference to the legal work of the English linguistic analysts seems to be called for, if not as a distinct school of thought, then at least to veil the baldness of such phrases as " the objective meaning of legitimacy " (p. 203). English readers, too, are entitled to be directed by the bibliography to the English editions of such works as Brunner's *Gerechtigkeit*, Rommen's *Die Ewige Wiederkehr des Naturrechts*, Radbruch's *Rechtsphilosophie* and Renner's *Die*

Rechtsinstitute des Privatrechts, more especially as the titles in translation do not always follow literally the original.

Any modern Anglo-American work which sets out to survey the development of legal thought naturally invites comparison with Huntington Cairns' *Legal Philosophy from Plato to Hegel* (1949). To say that Dr. Friedrich's will not replace the earlier work implies no criticism; his is altogether a slighter production, though more comprehensive in scope. Nor is it so thoroughly grounded in the philosophical seed-bed of European civilisation. But as a readable survey in manageable proportions of the course of jurisprudential thought, it will be a welcome accession to law library shelves.

I. D. WILLOCK.

Maasdorp's Institutes of South African Law, Volume I, The Law of Persons. Eighth edition, by C. G. HALL, Q.C., LL.D., Judge of Appeal in the Supreme Court of South Africa. 1958. Cape Town: Juta & Co., Ltd. £3 12s. net.

The first version of these *Institutes* was written by a former Chief Justice of the Orange Free State over fifty years ago. The work has proved popular among both students and practitioners in South Africa and it may be said to have achieved quasi-institutional status there. Maasdorp himself described his original aim as the provision of a readable compendium " of the law as laid down in Voet's *Commentary on the Pandects*, the textbooks of Grotius, van Leeuwen, and van der Linden, the *Theses* of van der Keessel, and the *Notes* of Schorer " as modified by South African statutes and decisions. The work has grown in size with the incorporation of the case law of the last half century, and the emphasis is today less on the opinions of the traditional text-writers and more on the effect of recent decisions. The work now consists of four volumes entitled respectively law of " Persons," " Things," " Contracts " and " Delicts and Dissolution of Contracts."

The law of Persons to Maasdorp includes not only family law but also the whole law of testate and intestate succession, and one marvels at the skill with which author and editor manage to cover this field in 250-odd octavo pages without giving their work the appearance of a nutshell. The text is attractive to read because all the references to cases and authorities are collected in the footnotes. Inevitably some loose ends in editing appear. For example, from three scattered references in the discussion of domicile, intestate succession and maintenance, the reader infers that adoption of children in South Africa is regulated by Act 31 of 1937; but there is no description of the institution of adoption as such in the book. On p. 21, n. 61, the case reported in 1957 as *Ex p. Constancon* is given as *Ex p. Constanion*, and its year as 1953.

In general, however, new material seems to have been introduced in a satisfactory manner, a good example being the summary of the important changes made by the Matrimonial Affairs Act of 1953 in the position of a woman married in community of property.

PETER STEIN.

Unauthorised Administration (*Negotiorum Gestio*) *in South Africa.* By Leslie Rubin, ll.d. 1958. Cape Town: Juta & Co., Ltd. £3 6s. net.

The main thesis of this book is that " the *negotiorum gestio* of Roman law is, today, with little change, part of the law of South Africa." The present Chief Justice of South Africa in a Foreword is impressed by the " revelation of the fullness of development which the Civil Law had reached by Justinian's time on the subject." Here, as elsewhere, the main outline of principles was clearly drawn in the *Corpus Juris*, and the treatises of the Commentators did little more than fill in the details.

In Part I of the book (pp. 1 to 15) the author first sketches the Roman law and then shows that the Dutch Commentators accepted that law with a few modifications; *e.g.*, they allowed the *gestor* to recover compensation for expenses incurred even when his administration was in the face of a prohibition by the *dominus*, and they did not draw a necessary presumption that expenditure on behalf of a near relative was incurred *animo donandi*. In Part II (pp. 16 to 79) the requisites of *negotiorum gestio* and the rights and duties of the *gestor* in modern South African law are set out in detail. The author supports his propositions with a fascinating mixture of authorities culled from the last fourteen centuries. Thus, in discussing the circumstances in which the *gestor* can bring the *actio contraria* to recover expenses incurred in the administration, he cites within the space of a single page (45–46) the *Exceptiones Petri* (11th century), the glossator Rogerius (12th), the humanist Duarenus (16th), Vinnius (17th), and Pothier (18th). The author apparently regards opinions of widely diverging date as equally useful in illustrating the *jus comune*. There is no hint that they might reflect ideas current in their respective periods. This unhistorical approach to the exegesis of the Roman texts was characteristic of the *Pandektenwissenschaft* of the nineteenth century. It is, of course, natural that the exponents of the uncodified Roman-Dutch law should be primarily concerned with finding a helpful rule which can be regarded as authoritative today, and less interested in historical evolution. But the reader, accustomed to modern European works on similar topics, is bound to find this approach somewhat old-fashioned.

There is a full discussion of South African case law, which is richer in this field than Scottish case law. Those Scottish readers who discern a close kinship between Scots law and Roman-Dutch law will be gratified to find some references to Scottish decisions sprinkled among their South African cousins. They may, however, be puzzled to see the reference to Lord Neaves' opinion in *Fulton* v. *Fulton* (1864) 2 M. 893 at p. 901 given as " C. of S.M. 2, No. 163, p. 893." This is the more curious as Dr. Rubin cites *Kolbin & Sons* v. *United Shipping Co.* in the orthodox way.

The work ends with a survey of *negotiorum gestio* in other legal systems, mainly the French and German. The brief section on Scots law is taken from the *Encyclopaedia of the Laws of Scotland*, the authorship of which seems to be attributed to Green.

Latin texts quoted in Chapter 1 are marred by a number of slips: *e.g.*, in the very first quotation on p. 1 from Cicero's *Topica*, *oportet* is missing after *agier* in line 2, *quid* in line 3 should be *quod eius*, and in line 7 *licabit* should be *licebit* and *argumentum* should be *argumentorum.*

Peter Stein.

Early English Legal Literature. By T. F. T. Plucknett, F.B.A., Professor of Legal History in the University of London. Cambridge Studies in English Legal History. 1958. Cambridge: The University Press. Price 18s. 6d. net.

This is truly an excellent volume: indeed, it could not be otherwise, coming as it does from the pen of Professor Plucknett. It is one of the most enjoyable books on Legal History the reviewer has had the pleasure of reading. The six chapters consist of lectures delivered in London University under the auspices of the F. W. Maitland Memorial Fund in commemoration of the hundredth anniversary of Maitland's birth in 1850, having as their theme " that there is much to learn from Maitland's writings, not merely the results which he acquired but the method and inspiration of his work."

In the first chapter, which has already appeared in the *Law Quarterly Review*, Vol. LXVII, p. 179, entitled " Maitland's View of Law and History," the learned lecturer gives a most interesting and valuable account of Maitland's life and work and his views upon legal history. To praise Maitland, he says, " is indeed easy. Has any other man, living or dead, English or foreign, made seisin (for example) an entertaining subject ? " Maitland's writings on a subject of which he was a pioneer and a master are vitally important, not only for their statements but also for the fruitful new lines of research which they suggest. When he was a student the only substantial book on English legal history *per se* was the " abominably technical " work of Reeves. What led Maitland, at the time a very skilled conveyancer, to take up legal history was the disgraceful and revolting position in his view of having to apply queer rules of real property law which were old, absolutely dead and defied all reason. In his early pioneering days he carried the then newly-born Selden Society on his shoulders, eventually making it a flourishing adult " which could afford the occasional luxury of an extra volume." If only the Stair Society had existed in those happy days ! His inaugural lecture as Professor of English Law in Cambridge stressed the legal historian's need of a thorough training in modern law, yet pointed out the apparently insuperable " practical " difficulty of combining practice and research. Scotland in the twentieth century could have furnished him with examples of the difficulty overcome. Maitland, on the other hand, admitted that a man might be an excellent lawyer and yet be innocent of legal history—a fact on which Professor Plucknett's comment is " very fortunately so." The need for a training in modern law the learned Professor thinks is unsound. The study of legal history need not be annexed to the study of law. Maitland, who had indeed shown that the materials and logic of the two were quite incompatible and their aims and methods absolutely opposing, later abandoned his old theory and came to hold that law and legal history are separate and independent, and that legal history is not law but history. Professor Plucknett admits that Maitland's later view is not yet generally held. "It is still too often said that English law can only be understood historically . . . is it really as bad as that ?" (If, with respect, that be so in England, a Scots lawyer will have a different attitude. No doubt much of our law is now dead, but the influence of the past on modern law is there, cannot be ignored, and is necessary for a true appreciation of the rules of today, as Lord Cooper has so clearly indicated.) The true object of the teaching of legal history in Professor Plucknett's view is the furnishing of a liberal education—one must fully agree with this—adding that, in Scotland at least, it has also practical value—and, while Maitland coupled it with Jurisprudence, Professor Plucknett takes the view that, for students not normally fitted for or attracted by Philosophy, it should be the (compulsory) alternative to Jurisprudence. It surveys the law and criticises it from a distance and "has a wholesome discipline of critical thought."

In Chapter II Professor Plucknett starts his fascinating story of the early English legal literature, pointing out that the modern textbook, 150 years old, differs fundamentally in its methods and approach from the early literature. It has changed the English law into a system of principles. Books of systematic scholarship in early times began with Theology, *e.g.*, those of Gratian and Ivo; and they were at first basically collections of authorities. In English law one starts with something that was then novel, a legal textbook that was neither Roman nor Canon law—the *Quadripartitus*, with the *Leges Henry I*, of 1114—"an untidy and undigested mass of detail." Next came Glanvill's *Tractatus* which, though echoing Gratian, for some unknown reason was a work on Writs, and made writs part of the legal science of England. The learned Professor examines the *Tractatus* and the organisation by Glanvill of his material. The first three chapters of Book I show a very elementary attempt to lay down some of the main lines of legal analysis, while in putting his writs together Glanvill is indeed scientific. For the first time in English legal history there is a law book by a lawyer, based on principles derived solely from the law, and trying to state the law systematically, and separating substance from procedure. Book VII, dealing with questions arising on a death in a family, shows, says Professor Plucknett, Glanvill's originality, courage and mastery in discussing substantive law when writs failed him.

The influence of the *Tractatus* on the *Regiam* "has long been a teasing problem in the legal history of Scotland—67 J.R. 155" says Professor Plucknett. Lord Cooper's brilliant exposition settled its great influence: the learned writer in 67 J.R. discusses the text of Glanvill used in the *Regiam.*

In Chapter III we pass to Bracton, whose work, the lecturer says, shows a complete mastery of the law, and a fair acquaintance with Roman law, apparently from books. Professor Plucknett discusses the various MSS and the order of the book in relation to the *Institutes*, and observes that English legal literature had at last adopted a general ground plan for a law book.

Bracton was the start of a development in which actions become less prominent and he did what he could to further it. So one quarter is an attempt to state principles. His legal maturity is shown in his treatment of law as principles with procedure subordinate; Glanvill had been *forced* to adopt the attitude he did in Book VII. The learned Professor discusses Bracton's authorities and notes that he was a complete master of procedure, steeped in its administration. His *Notebook* shows his approach to the law—by cases, mostly old ones, used only as authority in the intellectual sense, as illustrations. Writs are, however, still his authorities. The treatment of procedure as mere mechanism to give effect to principles might have caused the premature abandonment of the only solid part of the law in favour of principles not yet strong enough to stand alone. It didn't, however, do so.

Bracton was the last great exponent in English law of the Latin, Roman and clerical tradition; and his work marks the end of a scientific tradition. Even in his day a new type of book appears written by men who were essentially practitioners and who try to give details of practice to their professional pupils.

Bractonian problems are discussed and solutions suggested in Chapter IV—*e.g.*, the *addiciones*; the Redactor, who Professor Plucknett thinks must have been Bracton's clerk, the secretary of a busy hard-worked judge. The book, he says, is obviously the work of a devoted and determined author making the most of a scanty leisure. There was clearly no proof-reading or revisal and only the Redactor's working drafts are the archetype of all the surviving MSS. Practice, the vast mass of detailed procedure, had outstripped theory; but in the chapters on Dower and Acquisition of Property the author succeeded in a then novel and mature aim of writing a book governed by the analysis of principles and their statement in general terms.

Professor Plucknett deals with the various views on Bracton's date and points out the difficulty of fixing a date where there has been slow maturing and the book has been under the author's hands for many years. The results of the copying of Bracton are clearly set forth.

With Britton one finds a complete social change. The lawyer now prefers French as his language. That may in part account, says the Professor, for Britton's success. Glanvill is at this time, too, put into French. A new class of lettered lawyers, who understood Latin but were fluent only in French, arises. The rapid development of ecclesiastical law under academic influence separated further the ecclesiastical and the lay lawyer and led to the insularity of the English law from the late thirteenth century. A notable work of this era is *Brevia Placitata*, of about 1260, by an unknown author, another book of writs, a pure formula book of the early unscientific type. Other tracts modelled on it formed the basic education of common lawyers generally, and it was the foundation of the *Novae Narrationes* —another practitioner's work based on pleadings. Both *Brevia* and the *Casus Placitorum* teach by applying to cases such rules of law as the pupil already knows. The dicta (notable sayings) of judges are given in the cases and this in the thirteenth century was not a novelty of the judges.

This era is followed, Professor Plucknett shows, by an effort to restore scholarship, rejecting, however, Bracton, in, *e.g.*, *The Fet Asaver*, much superior to Bracton in its classification and analysis, and ending with a section on Trespass, in which the reference to debt "or other like sorts of tort" Professor Plucknett thinks comparable with the "wrangous detention of debt" mentioned in Lord Cooper's *Dark Age*.

In the fourteenth century, however, once more forms become prominent. Under Edward I and II there had come a flood of litigation and of entrants to the profession, and standards fell. The only development now lay in unscientific collections of cases. These are the Year Books. Professor Plucknett compares the collections of papal decretals and the Norman collections, both valuable comparative studies; for the English judges, as he says, were also delegates and got a judgment from King and Council without the solemnity of a decretal. Reports taken from oral proceedings in England tended to be cast in dialogue form, so that the Year Books became essentially memorials of great barristers (serjeants). Apparently the lawyer was indifferent to the decision, only concerned with pleading and procedure, in which the common law to the end of the Middle Ages was backward. "The facts of a case were a jealously guarded secret, which was revealed to the court grudgingly and under pressure." Thus Professor Plucknett shows the contrast between the Year Books and Bracton's *Notebook*.

Maitland's great work was essentially Bractonian, but he showed the need, too, to study the earliest collections, not only for law but as collections of what was thought to be the source of our law. The Selden Society is filling this gap, *e.g.*, Vol. LXIX, where the learned editor, Professor Durham, has shown that a report necessarily began with a rough note made in court. Errors in Year Books, says Professor Plucknett, may be due to the work of another editor than the original note-takers, most of whom would be pupil teachers, possibly juniors to the serjeants. In the closing years of Edward I, one kind of collection became universal. Abandoning classification by subject-matter, it is bulkier and its unity is purely chronological while, *e.g.*, "the personality of Hervey 'the Hasty' and Chief Justice Beresford with his fearful oaths and stories, too blue for Maitland to transcribe!" are found faithfully recorded. The later sudden increase in MSS is clearly connected in Professor Plucknett's view with the increase of litigation and of lawyers and the falling standards. Subsequently, there are fewer MSS from lack of interest in Year Books, or of desire for reporting. So when printing started, it is *old* cases that are printed, probably because cases were not wanted. Though this was a dark age in legal literature, apart from Littleton, the law was developing. The lectures in the Inns, which were by the end of the sixteenth century written down, show signs of examination of the Year Books, which kept the continuity of English law to the Renaissance.

G. C. H. P.

On Law and Justice. By Alf Ross, PH.D., JUR.D., Professor of Law at the University of Copenhagen. 1958. London: Stevens & Sons, Ltd. Price £2 2s. net.

In recent years much writing of interest and importance on jurisprudential themes has come from Scandinavia, and Professor Ross is already well known to the English-speaking world for his *International Law* and *Towards a Realistic Jurisprudence*. The present book, published in Denmark in 1953, now makes a first appearance in English.

It is a welcome change from the customary Anglo-American discussion of sources, concepts and other men's theories of law. Ross's standpoint is empiricist and the arch-enemy is legal metaphysics and obscurantism. Law is a social fact and there is no *a priori* concept giving validity to law, such as the idea of natural law. He is seeking to carry empirical principles to their ultimate conclusions in the field of law. The book falls into two main parts, jurisprudential problems relating to the doctrinal study of law, and problems relating to legal politics. The former of these discusses some familiar problems, such as sources, interpretation, legal terminology (*i.e.*, fundamental conceptions), in which Ross founds on Hohfeld, but appears to have taken no account of the later work done on Hohfeld's terms by Corbin, Kocourek and Glanville Williams, and fundamental divisions of the law. In the latter part Ross turns to the discussion of legal politics or the idea of justice or righteousness. Justice, he holds, is the correct application of a law, as opposed to arbitrariness, and it cannot be an ultimate criterion by which a law can be judged. Even accepting all the criticisms which Ross levels at the idea of natural law, this seems hardly satisfactory; consider the case of the Nazi judge applying correctly some articles of Nazi legislation; is this justice? It is impossible to sever the notion of justice from metaphysics altogether. This seems to the reviewer the more difficult and less satisfactory portion of the book, and the part where the purely empirical approach is less satisfactory.

At the same time, the consideration of what Ross calls legal politics is a most interesting venture into a relatively unfamiliar tract of jurisprudential thinking, which " embraces all problems of action that arise from the use, for the attainment of social objectives, of the technique of the law, in particular legislation." It is " applied legal sociology or legal technique." This topic is not an easy one to elucidate, but Ross deserves great credit for battling with it and stimulating our thinking thereby.

Even if one does not agree with some of the learned author's propositions, it must be conceded that this is an important, individualistic book, well worth being made available to English-speaking readers, and provocative of thought and reflection.

DAVID M. WALKER.

The Evolution of the Judicial Process. By the Hon. James C. McRuer, Chief Justice of Ontario. (The W. M. Martin Lectures at the University of Saskatchewan, 1956.) 1957. Canada: Clarke, Irwin & Co., Ltd. Price 25s. net.

The W. M. Martin Lectures are a new series inaugurated at the University of Saskatchewan in 1956, under the auspices of the Law Society of Saskatchewan, as a contribution to legal education, and with the desire of advancing legal studies in the Saskatchewan University Law College. The lectures honour the Hon. W. M.

Martin, Chief Justice of Saskatchewan since 1941. This new foundation deserves a warm welcome and an expression of hope that the successive courses of lectures may help to achieve the aims of the founding body.

Any lectures on the judicial process probably suffer by inevitable comparison with Cardozo's famous series at Yale, and the present series is no exception. They are interesting, competently presented and represent the fruit of diligent inquiry, but lack the spark of genius and originality which makes a really outstanding series.

The three lectures deal respectively with the historical, contemporary and international aspects of the evolution of the judicial process. The first deals with development from Hammurabi through Moses, the ordeal and trial by battle, the Eyres, and the jury system down to the Act of Settlement. The second surveys the contemporary scene, the judiciary in France and Continental countries, U.S.A., U.S.S.R. and China, England and Canada, discussing the different methods of appointing judges and their different tenures. In this there is overmuch description and one would have welcomed more discussion and criticism. Are there, for example, any merits in a career-judiciary, as compared with elective judges or judges promoted from the bar, too commonly for party-political services? The last lecture surveys international judicial process from the Amphictyonic Council to the Permanent Court of Arbitration and the International Court of Justice.

While these lectures are eminently readable, it cannot be affirmed that they cast any new light on the subject, but rather bring together the current knowledge on the subject, and more originality, criticism and constructive suggestions would have been welcome.

David M. Walker.

Negligence in Delict. By the late J. C. Macintosh, LL.B., and G. Norman-Scoble, LL.B., Advocates of the Supreme Court of South Africa. Fourth edition. By G. Norman-Scoble. 1958. Cape Town: Juta & Co., Ltd. Price £6 net.

This is an accepted South African treatise on negligence, and its practical value can best be vouched by the fact that it has attained a fourth edition in thirty years. While detailed criticism of a treatise on an unfamiliar system of law is out of place, the broad principles of negligence in South Africa are fundamentally similar to those applicable in Scotland and England, and the greatest interest of this South African text for a Scottish jurist lies in the discussion of the sources and bases of the principles, and in seeing how another modern system with Roman origins, but subject, like Scots law, to the Anglo-American influences of *stare decisis* and principles of tort, copes with the problems of negligence in modern conditions.

The book is written fundamentally from the defender's side; that is, the principles are grouped and discussed from the angle of " liability for . . ." rather than from the angle of " claims for infringement of . . ." and the strongly practical approach is shown by the fact that the second half of the book is devoted to running-down cases. This rather spoils the symmetry of the arrangement, since the last chapter of Part I, that on damages, applies equally to cases discussed in Part II, and this arrangement obscures the fact that running-down cases are only one instance of negligence (though doubtless the most prolific of litigation).

The problems of liability, causation and remoteness exist in South Africa as in the United Kingdom, and are resolved by reference to the same tests, though the discussion at pp. 59–67 does not seem clear; thus *Bourhill* v. *Young* is cited as an authority on remoteness of damage, whereas the case turned entirely on liability and anything said about remoteness was *obiter*. Accordingly, the statement that South African law rejects the rule of *Re Polemis* [1921] 3 K.B. 560, must be treated with reserve, since the whole discussion of these related problems seems confused.

There is an interesting discussion of the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, which shows that the rule is accepted only with reserve and in a limited sphere: as in Scotland, the result of that case can be arrived at in appropriate cases on ordinary principles of negligence. So, too, a close parallel to the Scottish claim for *solatium* and patrimonial loss caused by the death of a close relative can be found in the South African action of damages for the death of a *paterfamilias*, based on an anomalous extension of the principle of the *lex Aquilia*.

The similarity of origin of the South African and the Scottish laws makes the discussion of the Roman and Roman-Dutch sources and analogies of many of the rules of great interest. The book unfortunately contains quite a number of misprints, and a number of the United Kingdom cases cited are misnamed or have their facts misstated in minor respects, but it is undoubtedly a full discussion of the circumstances relevant to negligence in the Union which will be of value to practitioners there, while for the jurist abroad it provides a most interesting account of continued reliance on Roman sources and indigenous development for comparison with Scottish and English developments.

David M. Walker.

The Development of International Law by the International Court. By Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A. 1958. London: Stevens & Sons, Ltd. Price £3 3s. net.

The authority of Sir Hersch Lauterpacht as an expositor of the functioning of the International Court could hardly be bettered, and this book displays all his customary scholarship and mastery of the subject. It is a revised and greatly enlarged edition of a smaller book published in 1934, dealing with the development of the Permanent Court. It is only natural, now that a further twenty-five years have passed and the Permanent Court has become the International Court, that there should be much more source material, more examples to cite, and that trends should be more clearly visible.

The book is a jurisprudential rather than a dogmatic study, concerned, that is, not with the contributions of the court to the corpus of principles of international law, but with evaluating the work of the court in terms of the problems of the judicial function, problems which in part it shares with other judicial tribunals, and which are, in part, peculiar to the International Court by reason of its jurisdiction and the relatively undeveloped rules which it seeks to apply and develop.

Thus there is discussion of the way in which the court handles the authorised and accepted sources of international law and of the judicial technique employed, and of the ways in which judicial caution, hesitation and reserve limit the bold development of international law and restrict judicial legislation, but thereby make the development more certain and impressive when it does take place. Particularly interesting is the examination of the varying judicial attitudes to such issues as the resort to *travaux préparatoires*, wherein the practice of the International Court varies markedly from the conventional British attitude, and the practice of judicial legislation which shows the creative function of the international judiciary at work in a manner and to an extent not materially different from what one is accustomed to in municipal courts.

Also interesting and important, having regard to British doubts, based on rigid Austinianism, of the truly "legal" character of international law, is the discussion of the effectiveness of international adjudication, the visible tendency for the court to secure the effectiveness of treaties and instruments conferring jurisdiction on it, the tendency to attach importance to provisions for equality of treatment of aliens and the tendency to uphold the existence and functions of the international organisations.

The last part of the book deals with the fundamental issue of conflict between full State sovereignty and the limitations imposed thereon by international obligations, discussing the difficult task of the court in cases of such conflict. The learned author shows how the court has tended to stress the obligations of sovereign States in the matter of State succession, how it has tended to discourage the restrictive interpretation of treaties by not accepting the arguments based on State-sovereignty, and how it has subjected to the rule of law such collective sovereignty as is embodied in the General Assembly.

This book is important not only for international law but for jurisprudence and the general theory of law also, as showing how similar in some ways and different in other respects is the practice of the International Court as compared with that of other courts, and it thereby casts fresh light on general problems of the judicial function and process. It is also a valuable and authoritative survey of the trends discernible from nearly forty years' working of the court, and on all grounds it merits the careful attention of all interested in the wider aspects of law.

DAVID M. WALKER.

Cases on Criminal Law. Second edition. By J. W. Cecil Turner, M.C., M.A., LL.B., Barrister-at-Law, and A. Ll. Armitage, M.A., LL.B., Barrister-at-Law. 1958. Cambridge: The University Press. Price 60s. net.

The late Professor Kenny supplemented his popular *Outlines of Criminal Law* by his *Cases on Criminal Law*, wherein well-selected cases relating to the various topics discussed in the *Outlines* were gathered together. Thus the textbook became more attractive to the student, who could also read comprehensive reports of leading criminal cases without having to go beyond another small volume.

The work of Professor Kenny is now being continued by Mr. Turner and Mr. Armitage. They have edited the sixteenth and seventeenth editions of his *Outlines*, the last-named in 1958. They have, however, found it advisable to write a case book of their own rather than attempt to bring his *Cases* up to date. The first edition of their *Cases on Criminal Law* was published in 1953 and is now superseded by the present volume, in which more recent decisions appear in a very full supplement. Each selected case in the book contains a concise summary of the material facts and quotations of the most significant passages in the judgment or judgments. It is numbered to correspond with the paragraph or paragraphs in the seventeenth edition of the *Outlines*, to which it relates. Tables of cases selected or cited are provided, and there is a good index.

Along with its companion edition of the *Outlines* this book worthily continues Professor Kenny's system and upholds the high standard of his work.

F. C. W.

The Complete Guide to the Rent Acts. By Lionel A. Blundell, LL.M., and V. G. Wellings, M.A. (Oxon.). 1958. London: Sweet & Maxwell, Ltd. (514 pp.) Price £2 2s. net.

The Rent Acts have been judicially referred to as "that welter of chaotic verbiage," "a byword for confused draftsmanship," and "a chaos of verbal darkness." It is not surprising, therefore, that any new book that offers a path "through the labyrinth and jungle" of the Acts is assured of a welcome from the legal profession, and this welcome is naturally warmer when one of the authors is an authority of the standing of Mr. Blundell. From the point of view of the Scottish lawyer, however, it is unfortunate that this guide deals, in the main, only with the position in England and Wales. Up to 1957, the law of rent restriction was broadly on a Great Britain basis, but under the Rent Act of that year there was provided for England and Wales a completely new rent structure based on gross values for rating and a revised procedure for houses in disrepair. In Scotland, the controlled rent is still based on the general principles laid down in the Rent Act of 1920, subject to recent statutory provision for certain permitted increases, and the pre-1957 disrepair machinery has been retained. The jurisdiction and procedure of Scottish rent tribunals also differ now in some respects from those of the tribunals operating south of the border. But while the law has diverged in regard to controlled rents and disrepair machinery, there are still some aspects of rent control in regard to which the law in both countries is essentially the same, and on these aspects the Scottish practitioner will find the effect of the Acts and of the decided cases explained in the Guide with lucidity and accuracy. The statement of the law is carried right up to the passing of the Landlord and Tenant (Temporary Provisions) Act, 1958, which came into force on August 1, 1958.

The whole Guide is eminently readable, well arranged for easy reference and makes this abstruse subject as clear as it can be made. The various Rent Restrictions and Rent Control Acts are printed in the Appendix, but for the reason given above none of the purely Scottish rent control statutes—for example, the Rent of Furnished Houses Control (Scotland) Act, 1943, and the Housing (Repairs and Rents) (Scotland) Act, 1954—are included.

I. C. K.

Traffic Victims: Tort Law and Insurance. By Leon Green. 1958. Illinois: Northwestern University Press. Price U.S. $4.00.

Professor Green's latest book is based on lectures given for the Julius Rosenthal Foundation and the Robert S. Marx Foundation and discusses the obsolescence of negligence law, jury trial and liability insurance for the 40,000 deaths, the more than a million serious injuries and the extensive property losses which occur annually on American highways. He proposes as an alternative a system of comprehensive compulsory loss insurance for every motor-vehicle placed on the highways, covering all losses that may be received as a result of its operation.

The author traces the swing of the pendulum of tort law from the medieval idea of absolute liability to the injured party, based on the *lex talionis*, up to the present-day conception of liability based on negligence. He shows how, with the transition from an agricultural to an industrial economy, tort law began to develop in England and America from the early 1800s. With the improvement in roads for transport purposes, " horse and buggy " traffic collisions increased enormously. The building of railways and canals and of factories containing dangerous machinery also multiplied the number of claims for compensation. If development of the new economy were not to be stultified the rights of the individual had to be curtailed, and gradually the courts evolved the artificial concept of " liability based on fault," which weighed the scales heavily against the injured party. It is true that this bias was to a certain extent modified during the nineteenth century; Lord Campbell's Act of 1846 made provision for recovery of damages on behalf of the family for injuries resulting in the death of one of its members; *Rylands* v. *Fletcher* modified the rights of landowners; *Byrne* v. *Boadle* enshrined the immortal phrase *res ipsa loquitur*; the doctrine of invitee, licensee and trespasser was developed and weight was given to the violation of a police statute or ordinance in civil litigation. Nevertheless, notwithstanding the tremendous increase in accidents due to the development of the internal combustion engine, the fact remains that at the present time only a percentage of injured persons are able to satisfy the factual and legal niceties which entitle them to reparation.

The indications are that the pendulum is beginning to swing in the other direction. As the author says:

> " Perhaps it is near the truth to say that ' we, the people ' have come to see that it does not pay to place the risks of our

> industrial society on its victims. Most of the risks are too heavy to be borne by the individual. Most of them are imposed by the very complexity of our activities and are uncontrollable and unpreventible. Where so many people are active about so many things, the individual, however alert and however proficient, cannot protect himself against them. Moreover, he may be actively engaged himself, and any protection he can provide frequently becomes apparent only after the injury. Also, he is a human being, and human beings are subject to lapses, awkwardness and bad judgment and may be handicapped by lack of experience and physical and emotional limitations. Any standard of conduct that can be devised by the courts is, more frequently that not, a mirage."

If the author's proposal were adopted insurance companies and reparation lawyers would not lose business. The insurance companies would operate as at present but subject to Government supervision. They would have to pay out more but they would receive more in premiums. Reparation lawyers would receive fewer large fees but many more small ones. The courts—probably delegating their powers to "Masters"—would still have to decide the fact that the claimant had suffered injury as the result of the use of a motor-vehicle, the extent of the injury and amount of the loss and, where contested, the identity of the vehicle involved. The author points out that:

> "The hectic prosecutions by jury trial will give way to rational inquiry. The expense of extended investigations now required to establish negligence and to support and meet the numerous defences permitted a defendant will be largely eliminated. Investigations will be focused on the fact and extent of injury."

Professor Green's book should be read by every Scottish lawyer interested in reparation law and by all Members of Parliament. He satisfactorily disposes of the facile criticism, which is always trotted out when a monopoly is attacked, that his suggestion is Communistic in origin. His one concern is to give the general public some protection against the machines of the highway which negligence law does not do. The only criticism that might be levelled against him is his misconception that the famous snail in *Donoghue* v. *Stevenson* —if it ever existed—was an English one.

H. M.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Dymond's Death Duties. Third (Cumulative) Supplement to Twelfth Edition. By Robert Dymond and Reginald K. Johns, LL.B. 1958. London: The Solicitors' Law Stationery Society, Ltd. Price 21s. net.

Repertory of Practice of United Nations Organs. Supplement No. 1. Volume II, Articles 55–111 of the Charter. 1958. New York: United Nations. Price U.S. $4.50; 32s. stg.

Clerk and Lindsell on Torts. Fourth Cumulative Supplement to the Eleventh Edition. By F. Maurice Drake, M.A., Barrister-at-Law. The Common Law Library, No. 3. 1958. London: Sweet & Maxwell, Ltd. Price 7s. 6d. net.

Human Rights and World Order. The Struggle for Human Rights in the United Nations. By Moses Moskowitz. 1958. New York: Oceana Publications. Price U.S. $3.95.

The Dynamics of Supply: Estimation of Farmers' Response to Price. By Marc Nerlove. The Johns Hopkins University Studies in Historical and Political Science. Series LXXVI, No. 2. 1958. Baltimore: The Johns Hopkins Press. Price, paper U.S. $4.00; cloth U.S. $5.00.

Das Zivilprozessrecht Finnlands. By Tauno Tirkkonen. 1958. Helsinki: Akateeminen Kirjakauppa.

A Legal Bibliography of the British Commonwealth of Nations. Second Edition. Volume 6: Australia, New Zealand and their Dependencies. 1958. London: Sweet & Maxwell, Ltd. Price 30s. net.

Family Property Among the Yorubas. By G. B. A. Coker, PH.D., LL.M., Barrister-at-Law. With a Foreword by Sir Maxime de Comarmond. 1958. London: Sweet & Maxwell, Ltd. Price £2 5s. net.

Loyalty and Security: Employment Tests in the United States. By Ralph S. Brown, Jr. Yale Law School Studies, 3. 1958. New Haven: Yale University Press; London: Oxford University Press. Price 48s. net.

The Law above the Rule of Law. A Criticism of an Enterprise of the Cold War. By Abbé Jean Boulier. 1958. Brussels: International Association of Democratic Lawyers Publications.

JURIDICAL REVIEW

SOME OBSERVATIONS ON DIMINISHED RESPONSIBILITY *

NEARLY a year ago I was unable to indicate to your Secretary the title of my address tonight, and after that full period of reflection I have thought of no better title than " Some Observations on Diminished Responsibility." My observations are necessarily confined to the legal side of this subject though I feel that the medical side, with which, of course, I am quite unqualified to deal, is no less important and perhaps more interesting. Until the passing of the recent Homicide Act there was no common ground on which, in England, law and medicine could meet in dealing with the problem of mental instability, short of insanity. Much academic or philosophical discussion could take place on the subject, with, no doubt, a large measure of agreement or disagreement. But now both law and medicine are faced with questions which have a practical issue in the criminal law of England.

From the legal angle the question of diminished responsibility is, for England, in the meantime, settled and limited by the Homicide Act. I have no intention of entering on an interpretation of section 2 of the Act. This is a matter which must be left to the Judiciary, and in the course of this address I shall make only passing references to the Act.

It occurred to me that it might be of some interest to you to know something of the genesis of the doctrine in these islands. This, of course, took place in Scotland. Lord Goddard has referred to it as part of the common law

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* An address to the Medico-Legal Society by the Rt. Hon. Lord Keith of Avonholm, reprinted by permission of *The Medico-Legal Journal*.

of Scotland. This is so if all that is meant by common law is unwritten law. But as such it is an interesting example of the creation of common law. It does not spring from custom. I have heard it referred to as judge-made law. And this is correct. In its application to indictments for murder, where there could be no discretion as to sentence in the event of conviction, it originated from a series of pronouncements by one judge, in the latter half of the last century, in the course of charges to juries, which were followed in later cases by other judges. The approved practice before this date was to convict of murder, with a recommendation to mercy in cases where the accused was afflicted with a weakness of mind not amounting to insanity. In such cases only the Crown, of course, could act on this recommendation. In cases, however, of arbitrary punishment, that is cases where the court had a discretion in the kind or length of sentence to be imposed, a few earlier cases can be found of the court exercising clemency in respect of weakness of mind of a convicted person.

It is interesting to look at the first recognisable case of the application of the doctrine of diminished responsibility in a case charged as murder. The case is *Her Majesty's Advocate* v. *Dingwall* tried in 1867 (5 Irv. 466). The accused had stabbed his wife with a carving knife in the early hours of January 1, 1867, in consequence of which she died a fortnight later. He was a man addicted to drink and the evidence was that he had drunk some eleven glasses of whisky during the day of December 31, mostly between 4 p.m. and midnight. The cause of the attack may have been annoyance at his wife for concealing a bottle of whisky which he had brought home with him. Various points were dealt with by the trial judge in his charge to the jury, including intoxication and insanity. He charged against the prisoner on the intoxication issue and left the insanity issue to the jury. He then directed the jury to the question whether the offence was something short of murder. Among the considerations referred to were that the prisoner appeared to be not only peculiar in his mental constitution but to have had his mind weakened by successive attacks of disease. It seemed probable he had sunstroke in India and fits of an epileptic nature. He had had repeated attacks of delirium tremens. The direction in law to the jury, as given in the report, was as follows: " The state of mind of a prisoner might be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity, and he could not therefore exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide." The jury returned a verdict of culpable homicide and the prisoner was sentenced to ten years' penal servitude.

The judge who charged the jury in the case was Lord Deas and he directed juries to a similar effect in a number of murder cases down to the date of his retirement from the Bench in 1885. I want, however, to refer to another case which was a case not of murder, but of theft by housebreaking, with three previous convictions. The case is *Her Majesty's Advocate* v. *McLean* in 1876 (3 Coup. 334). A jury had found the prisoner guilty but recommended him to the leniency *of the court* in respect of his weak intellect. The man in fact appears to have been imbecile. The Lord Justice-Clerk (Moncreiff) who tried the case certified it on the question of sentence to the High Court and called for a report from a Commissioner of the Lunacy Board, which confirmed the verdict of the jury. The court was constituted by the Lord Justice-Clerk and Lords Deas, Young and Craighill, and the judgment of the court was given by Lord Deas. In the course of his judgment he said: " I am of opinion that, without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity, which may make it both right and legal to take that state of mind into account, not only in awarding the punishment, but in some cases, even in considering within what category of offences the crime shall be held to fall."

The other judges concurred and the sentence imposed was six months' imprisonment.

I am not sure that this case has always been sufficiently noticed in considering the scope and effect of a plea of diminished responsibility. In the matter of mitigation of sentence it is in line with some earlier cases and it has been followed since in the case of a public school boy who pled guilty to wilful fire-raising and of whom evidence was given that he had had meningitis as a child and suffered from arrested mental development. Sentence was restricted to twelve months' imprisonment.

I may, perhaps, here be allowed to make a digression. I have heard it said that the doctrine of diminished responsibility came in as a reaction to the penalty of capital punishment. It may be so. I can only say I have come across no evidence of the fact. And the late emergence of the doctrine is the more remarkable in being associated with the name of Lord Deas. It seems somewhat out of line with the character of Lord Deas, as we know it, unless it can be said that as a man of the soil he was more receptive to new ideas than the more sophisticated and educated judges of his time. He was the son of a small farmer in Fife and made his way at the Bar and to the Bench by his own unaided grit and determination. He was on the Bench from 1853 to 1885 and died on February 7, 1887. I have looked up various obituary notices of the time in legal journals and newspapers and none that I have seen refers to the part he played in introducing the doctrine of diminished responsibility. In parenthesis I should add that I have not found the phrase "diminished responsibility" used by a judge before 1909. Lord Deas was a strong judge with an independent mind. As a man I would describe him as rough, gruff and tough, though photographs show him as a man of refined features. In one notice at the time of his death it was said: "He was the last link that bound us to the powerful and plain-spoken giants of a former generation. We shall probably never hear the 'native Doric' spoken in such purity on the Bench again." *The*

Scotsman newspaper said—and this is interesting in view of the part he played in moderating the severity of the law of murder—" He was indeed—and we state the chief if not the only blot in his judicial character when we say so—too eager for conviction and in questions of guilt or innocence a little too ready to assume his own omniscience and that of doctors and detectives not half so scrupulous as himself. Still be it also set down to his credit that he often manifested a singular kindly consideration for respectable men and good-looking women who did not belong to the criminal classes and who had been landed in the dock by one sudden explosion of passion or by one false step." I might add as a last point of interest on the author, as I shall call him, of the new doctrine that he was the judge who tried the remarkable case of *Jessie M'Lachlan* ((1862) 4 Irv. 220; 35 Sc.Jur. 50), convicted of murder—often referred to as the Sandyford murder—his conduct of which was then, and since, the subject of much criticism. An eminent legal contemporary of Lord Deas has recorded his opinion that her execution would have been " a judicial murder." [1]

The doctrine as applied to homicide has the effect in Scotland, as now in England, of altering the quality of the offence. There is no instance of its ever having been applied in Scotland with similar effect to any other category of crime. But if the judgment of Lord Deas in *McLean's* case be accepted there is no reason why this should be so, if there is postulated a crime which may be reduced from a higher to a lower category. I can conceive of some such. On the other hand, it is difficult to see what lower category could be invoked in a case of simple theft. But the question is largely academic because, as only murder (I exclude treason and a few special statutory offences) carries with it a fixed penalty, the other cases can be met by mitigation of sentence. I would question, therefore, the statement in the Report of the Royal Commission on Capital Punishment (§ 413), that " the Scottish doctrine of diminished responsibility, on the other hand, is of far narrower scope:

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[1] *Sir Archd. Alison's Autobiography*, II, 505–506.

it is confined to murder." In England, of course, under the Homicide Act it is only in homicide that diminished responsibility can be invoked to reduce the quality of the offence. I do not venture to intrude into English criminal law, but I have failed to discover whether defective mentality not amounting to insanity would be a mitigating circumstance with an English court in the matter of sentence. I should be glad of any observations on this point that may follow this address.

I may point out here, what you perhaps have already detected, that there was a certain logic in the development in Scotland of the doctrine of diminished responsibility. If, in the case of lesser crimes than murder, it was open to the jury to recommend the accused to the leniency of the court in respect of weakness of intellect, it could be regarded as unjust that in a case of murder no account could be taken of disease of the mind not amounting to insanity. If a verdict of murder was returned the court had no option in the matter of sentence. But if a verdict of culpable homicide (*anglice* manslaughter) was returned it was open to the court to impose any sentence (short of death) which it thought the circumstances warranted.

The question of sentence in such a case came up for consideration in Scotland in the case of *Kirkwood* (1939 J.C. 36, S.L.T. 209). The crime here was a very atrocious case of murder. Evidence was given in the course of the trial that the prisoner had a history of epileptic fits accompanied on occasions with violence and had exhibited other features of mental instability. After medical evidence led by the Crown a plea of culpable homicide was tendered by the accused and accepted by the Crown. The trial judge imposed a sentence of penal servitude for life, saying it was impossible to assess the precise degree of responsibility. Appeal was taken against the sentence. The argument on the appeal was that a life sentence was unjust and oppressive and should not be regarded as competent in the case of a man suffering from impaired responsibility. The view of the court was that protection of the public, which could not be dissociated from the accused's own protection, was a relevant consideration and that it could not reasonably be maintained that the greater the degree of irresponsibility the less should be the punishment imposed, especially as complete irresponsibility in the case of insanity carried with it an indefinite period of detention. The appeal was dismissed, with a direction that the evidence should be transmitted to the prison commissioners for consideration of his future treatment.

Two types of individual call for special mention in the matter of diminished responsibility—the psychopath and the mental defective. The Royal Commission on Capital Punishment gave considerable attention to the offender of psychopathic personality (§§ 393–402, 658–671). The psychopath, they said, " differs from a normal person only quantitatively or in degree, not qualitatively." The Scottish courts, while showing an obvious reluctance to treat a psychopath differently from a normal individual, have not gone to the length of saying that it should not be left to a jury to say whether a person exhibiting psychopathic peculiarities may be suffering from diminished responsibility. They have, however, come very near saying so. In the case of *Carraher* (1946 J.C. 108, S.L.T. 225) the trial judge had, with some difficulty, left it to the jury to say whether, on medical evidence of psychopathic personality, the accused was a person of diminished responsibility. The jury found the accused guilty of murder and, on appeal on the ground of misdirection and that the verdict was contrary to evidence, the case was heard by a full Bench of five judges. In the course of a judgment dismissing the appeal the Lord Justice-General (Lord Normand), referring to the medical evidence, said: " *I also* have great doubt whether it was evidence of anything approaching to mental disease, aberration or great peculiarity of mind and whether the judge might not have been warranted in withdrawing the issue from the jury. The court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility."

I had the curiosity to look up the meaning of " psychopath " in the *Oxford Dictionary* and found this: " One afflicted with psychopathy; a mentally deranged person "; and " psychopathy " is defined as " mental disease or disorder." Admittedly this is not a medical or scientific dictionary and you may be interested to hear how the matter was stated by one of the medical witnesses in *Carraher's* case: " I am inclined to place the accused in the category of a psychopathic personality. A psychopathic personality is a clinical condition in which are included persons who from childhood or early youth show all the gross abnormality in their social behaviour and emotional reaction, and who do not as a rule show enough insanity to be certifiable as insane." And again: " Broadly speaking it is a condition in which there is an inability on the part of the person affected to adapt himself to the ordinary social conditions, usually less than insanity which is certifiable. It is associated with emotional instability."

I have recently read an article in *The Modern Law Review*[2] under the title of " The Psychopath and the Defence of Diminished Responsibility " evoked by the case of *R.* v. *Matheson* ([1958] 1 W.L.R. 474). That case is referred to as " the first reported case where the nature of psychopathic personality has been directly considered in relation to the defence of diminished responsibility." This is where, I think, the views of medical men to which I referred at the outset would be interesting. It certainly seems to be the case that all the medical witnesses agreed that Matheson was a psychopathic personality. But I doubt whether the Scottish courts would ever have treated this as a psychopathic case, and I cannot find that Lord Goddard, who gave the judgment in the Court of Criminal Appeal, mentioned it as such. The killing and subsequent conduct of the accused was of a very atrocious nature, but, as I read the case, it was on unanimous evidence to the effect " that he was suffering from such abnormality of mind (arising from a condition of arrested or retarded development of mind) as substantially impaired his mental responsibility for his acts in doing the killing " that the case was decided.

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[2] Vol. 21, Sept. 1958, p. 544, J. E. Hall Williams.

The article to which I have referred contains this passage: " The case (*Matheson's* case) does not indicate with any certainty what view would be taken of a psychopathic personality of normal or ordinary intelligence." That as I read it was *Carraher's* case, where the court upheld a verdict of murder. The view of the Royal Commission (§ 401) clearly was that " in many cases the responsibility of psychopaths can properly be regarded as diminished." There can be no permanence of ideas in a matter of this kind. We move with the times. It must be left to the courts in England to say whether some psychopaths may be held to be suffering from some abnormality of mind arising from inherent causes so as to support a finding of diminished responsibility within the meaning of the Homicide Act and to the Scottish courts to consider what weight judges or juries may give to evidence of psychopathic traits in a particular individual. I should perhaps add as a postscript that it has been held in Scotland that a man cannot be held to be of diminished responsibility merely as a result of drunkenness. As one judge recently put it, a person not shown by the evidence to be within the category of one with a diminished responsibility when sober cannot place himself within that category by taking drink.

The mental defective is, of course, a subject in various respects of special statutory treatment which may be said to take account of his diminished responsibility. And this is so in the case of offences to which at least the penalty of imprisonment attaches, both in England and in Scotland.[3] In Scotland it is very unlikely that the Lord

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[3] Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28, s. 8); Criminal Justice (Scotland) Act, 1949 (12, 13 & 14 Geo. 6, c. 94, s. 24).

Advocate would ever indict an acknowledged mental defective for murder. There could, however, be cases where the defence might maintain and the Crown might not accept that the accused was a mental defective. In such case the matter would be left to the jury on a defence of diminished responsibility, which the prisoner's counsel would be unlikely to confine merely to mental deficiency under the Acts. In England—and only here do I express any opinion on the ambit of the Homicide Act—it would appear that mental deficiency if established would come under the language of section 2. In fact some of the language of the section follows closely expressions used in the definition of mental deficiency in the Mental Deficiency Act, 1927.

The question of sentence on a person of diminished responsibility is, of course, tied up with his subsequent treatment while in prison or under detention. I am not qualified, even if I had time, to go into the matter of the trial and treatment of persons of impaired mentality who have offended against the criminal law of other countries in Europe and elsewhere abroad. But from a perusal of some of the information contained in the Report of the Royal Commission on Capital Punishment I have the impression that in some other countries [4] a more thorough and scientific approach to the problem exists, especially in the case of psychopaths, than we find here. This is a country, however, in which we tend to move step by step. In many of the countries to which I have referred there is no capital punishment. It may be that in this country, by which I include both England and Scotland, the doctrine of diminished responsibility will receive further extension either by judicial decision or legislative action. Perhaps I may be allowed to conclude by saying that in England one step has been taken which in the law of homicide modifies the conception that there is no halfway house between complete legal irresponsibility and the understanding of the reasonable man. See *R.* v. *Ward* [1956] 1 Q.B. 351.

KEITH OF AVONHOLM.

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[4] Denmark § 665, Appx. 9, §§ 12 (b), 16 (b), 20 (b), 28 (b); Holland § 667, Appx. 9, §§ 12 (e), 16 (e), 20 (e), 28 (e); Sweden § 666, Appx. 9, §§ 12 (g), 16 (g), 20 (g), 28 (g).

STRANGE GODS:* THE CRISIS OF SCOTS LAW AS A CIVILIAN SYSTEM

ALMOST exactly two hundred years ago, on October 25, 1758, Blackstone, the first Vinerian professor of English law, read his Inaugural Lecture at Oxford. While deploring the long and universal neglect of the academic study of English law, he contrasted the position in Scotland[1] —" And in the northern part of our own island, where also the municipal laws are frequently connected with the Civil (*scil.* Roman), it is difficult to meet with a person of liberal education who is destitute of a competent knowledge in that science which is to be the guardian of his natural rights and the rule of his civil conduct." Were this still true—taking Blackstone's statement *pro veritate*—I should have chosen a different theme for my address. But, alas, since 1758, we in Scotland have gone awhoring after some very strange gods.

Who, without faith and determination, would venture to predict that in A.D. 2000 Scots law will—in its most rational divisions—be entitled to claim acceptance as a civilian system? Already distinguished lawyers have pronounced the *viaticum*, and have claimed upon evidence which must be weighed seriously that the processes of assimilation to English law—a legal system of very different traditions—have advanced so far that the differences between the Scottish and English laws, for example, of obligations are mere matters of detail.[2]

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* An Inaugural Lecture delivered on October 17, 1958, on assuming the duties of Professor of Civil Law in the University of Edinburgh. The lecturer is deeply grateful for helpful criticism from Professor Peter Stein of Aberdeen, and for the stimulus of those scholars whom he was privileged to meet when lecturing in the University of Tulane, Louisiana State University and at Cape Town, Rhodes, Stellenbosch and the Witwatersrand in South Africa.

[1] Blackstone's *Commentaries* i, 4–5.

[2] *e.g.*, Professor F. H. Lawson, *Current Legal Problems* (1949) ii at p. 229; (1949) 61 J.R. at 27.

But my first thought this evening must be to express my thanks to those who had confidence in my qualifications to undertake the duties of this Chair at so critical a period in the progress of law and legal education in Scotland. So far as lies within my power, I shall endeavour to merit their trust. There could perhaps be no greater privilege and responsibility for a lawyer than that of guiding and stimulating—if necessary goading—the legal thinking of his youngest brethren on the threshold of a legal career.

Two qualities in particular seem to me to be demanded of a man called to the responsibility of teaching the civil law at this time and in this place. These qualities are humility and determination. Looking to the past—especially the immediate past—humility's claims are obvious. Our country has had few sons so selfless and courageous; this city has seldom had citizens so devoted and so steeped in her traditions; and this University Law Faculty has perhaps never had Dean and Professor of Civil Law so deeply dedicated to its interests as my predecessor, Emeritus Professor Matthew Fisher. Integrity and fearless resolution have marked out the course of his long and fruitful epoch of academic duty. The virtues which have ruled his life are essentially Christian and Roman. He will not, I hope, take it amiss if I suggest that Professor Fisher is one of the very few who could wear the toga in Princes Street today without appearing at all incongruous. Like myself, he has ties with Aberdeen, whence over four and a half centuries ago Bishop Elphinstone launched his great project[3] to ensure that all men of consequence in Scotland should be well grounded in Latin and the Roman law—a dream which died at Flodden with so much that could have brought light and enlightenment into our national life. Entering on a new phase of academic duty, I should fail in gratitude were I not to pay my tribute to Elphinstone's University, which for nearly ten years has given me so much encouragement and so many benefits—in particular the privilege of association with friends and colleagues dedicated to the furtherance of Scottish legal scholarship and legal literature, the encouragement of a Principal ardent in the cause of legal education, and the privilege of access—from a civilian's viewpoint—to the best equipped University Law Library in Britain, except for Oxford, Cambridge and London.

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[3] Act of 1496 C. 3. A.P.S. ii, 238 c. 3.

I am particularly touched that the Dean of the Aberdeen Law Faculty should have travelled so far to attend this evening's lecture, as also has my life-long friend, James Aikman-Smith now Sheriff at Aberdeen. May I also at this time express my appreciation to so many friends and well-wishers in this charming, learned and distinguished company who have honoured me by their presence on this occasion. It is for me a particular honour that you, Mr. Dean, a scholar of international reputation and deeply learned in the civil law, should preside at this my inaugural lecture.

Of humility I have already spoken. Looking to the future, determination or constancy is demanded of a Scottish teacher of the civil law in the mid-twentieth century. I am convinced that the civilian tradition in Scots law—that element which is the most rational, equitable, universal and potentially creative—is in jeopardy at the present time. There are pressures from outside our system and weaknesses within.

Scotland lives today largely through legal institutions which accept, and ecclesiastical institutions which reject, the authority of Rome. These are safeguarded by the basic constitution of the United Kingdom[4]—not by mere Acts of Parliament as the Dicey School of Constitutional Lawyers have thought, nor as some Scottish Nationalists have argued by an international treaty (which, in any event, became an executed treaty on May 1, 1707)—but safeguarded by constituent documents containing the fundamental law of the United Kingdom. The powers of the United Kingdom Parliament are limited by the terms of its own creation, and it can repudiate them only by tearing up its own birth certificate. In this connection, a civilian may observe that the distinction made in Article XVIII of the Union agreement (which distinguishes between public and private right and provides that no alteration may be made in the laws of Scotland concerning private right except for evident utility of the subjects within Scotland) is apparently inspired by Ulpian through Justinian's codifiers. In the *Institutes* we read[5] "Hujus studii duae sunt positiones, publicum et privatum, publicum jus est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet." And in the *Digest*[6] one finds very similar language.

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[4] This thought is developed in (1957) *Public Law* 99 esp. 105 *et seq.*

At the time of the Union of Scotland and England in 1707 Scottish private law was, thanks to the reception of the evolved civil law and to Stair's creative restatement in the natural law tradition, a mature system—especially in chapters of the law such as obligations[7] (contract and delict) and moveable property. The Law Faculty of this University, which was organised at the time of the Union, gave preference to instruction in the Public Law and Private Law of the Civilians. Professor Montgomery's earliest predecessor in the Chair of Scots Law—Bayne—could declare of the civil or Romanistic law in Scotland[8]: "The spirit of that law, which has been so universally received, shines forth in our law in a most conspicuous manner, and bating the remains of Feudal Law . . . the other parts of our law, are either formed after the pattern of the Roman Law or directly borrowed from it." The English law at this time was passing through an arid and formalistic phase, and was not to develop general theories of obligation for many years. When they did develop they were to be prisoners of precedent.

So far as Scottish doctrine regarding moveable property is concerned, except for far-reaching changes effected by the Sale of Goods Act, 1893, the civil law tradition has been substantially preserved. *Occupatio*, *specificatio*, *accessio*, *traditio*, *rei vindicatio*, and many other examples could be given. But so far as obligations are concerned—Contract and Delict in particular—though Roman and canon law principles provide the foundation of our law, these have in many instances been concealed by a somewhat Gothic superstructure. It is significant that the same trends are apparent in other "mixed" jurisdictions such as South Africa, Louisiana, Ceylon and Quebec.[9] Cross-bearings from Roman-Dutch law—which is, like ours, uncodified and derived from similar sources—are particularly valuable. A teacher of civil law in such jurisdictions, where Roman law is actually absorbed into the modern law, has a particular duty to stress the Roman principles—lest they be forgotten as factors potentially creative in the future development of law, or come to be regarded as matters for academic concern alone. Justinian's law is a mine of practical solutions to contemporary legal problems, and we have perhaps more to learn in Scotland from the title on the *lex Aquilia* (as ultimately interpreted) than in textbooks devoted to the so-called English tort of "negligence"—which developed quite recently in English law, and is certainly not coterminous with *culpa*.[10] Moreover, the literature recently made available in the Corridor of the Advocates Library[11] should help greatly in expounding the *modernus usus* in Scotland. The classical age of Scots law owed much to writers such as Grotius, the Voets, Huber, Bijnkershoek, Strykius, Groenewegen, Noodt, Heineccius, Matthaeus, Domat, Pothier, and so forth. They are still very relevant for the class of Civil Law as a preparation for that of Scots law. English law has helped to develop Scottish jurisprudence in some respects; and is much better endowed with modern legal literature and facilities for academic research than we are in Scotland. Nevertheless, so far as the kernel of lawyers' law is concerned, civil law and " common law "[11a] mix badly.

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[5] 1.1.4.

[6] 1.1.1.2.

[7] *Cf.* Lawson, *sup. cit.*, 232—from whose views on this point the present writer dissents with respect and a good deal of understanding.

[8] This passage from Bayne's discourse is printed with Hope's *Minor Practicks* (Edinburgh) (1726), 151–152.

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[9] See this developed by the present writer "The Common Law Cuckoo" (1956) Butterworths S.A.L.Rev. 147.

[10] See Elliott (1952) 64 J.R. 1; Dias, *Acta Juridica*, 216; Smith, *Development of Laws and Constitution of Scotland* (British Commonwealth Series) 1068 *et seq*.

[11] See 1957 S.L.T.(News) 122.

By a juristic equivalent of Gresham's Law, a number of illogical and restrictive doctrines, peculiar for historical reasons to the Anglo-American " common law " in the field of obligations, have been allowed to gain currency in those civilian systems which through political or economic factors have been associated with a common law jurisdiction on less than equal terms. As English law progresses to some extent from pigeon-holes to principles, paradoxically those " mixed " or hybrid jurisdictions such as those of Louisiana, South Africa and Scotland have moved too often from civilian principles to pigeon-holes analogous to those of the " common law."[12] How far can we in Scotland today concur conscientiously with Lord Macmillan's contention[13] that we argue from principles rather than from particular instances? ; or with Lord Cooper's description[14] of the Scots lawyer as using the fewest possible number of tools to perform the largest possible number of different jobs? I shall illustrate my submission presently, but first say a word about how this drift in Scottish legal tradition has come about.

Speaking generally, the direct means by which " common law " influence has been introduced into a " mixed " system include legislation by an organ primarily of " common law " background—in our case Parliament at Westminster—and judicial decisions of an ultimate appellate court controlled by " common lawyers "—in our case the House of Lords in its less regenerate epochs. Indirect sources of " common law " influence are through " common law " precedents and textbooks—especially where (as in Scotland) there is no language difference between the practitioners of the " common law " and those of the " mixed jurisdiction."

[11a] I have used the expression " common law " (in quotes) to signify Anglo-American law. Common law or *jus commune* has a different technical meaning in Scottish and other civilian systems.

[12] See note 9, *supra*.

[13] *Law and Other Things*, 84.

[14] *Selected Papers*, 179.

Factors which tend to limit " common law " expansion at the expense of the civil law comprise codification, or institutional restatement, autonomy in matters of internal legislation, adequate facilities for legal education, writing and research, dynamic literature, and a legal profession conscious of its tradition and united (whether in court, office or university) in the determination to develop the law in accordance with that tradition.

The late Lord Cooper of Culross thought,[15] if I understand him aright, that the spadework for a codification of Scots law had been done by the institutional writers, and that codification would have been practicable in the early nineteenth century. Though one can find in our institutional writers most of the principles of the evolved civil law which receive effect in contemporary codified civil law systems, these were never fully related and systematised, as might have happened had we codified our law. The basic principles have subsequently been overlooked in many instances, or obscured and restricted by incautious *ad hoc* references to " common law " solutions.

I might summarise and generalise the situation regarding the civil law received into the Scottish law of obligations through the institutional writers at its high water mark as follows. One might classify duties, as did Stair and Bell, as obediential or conventional.[16] As an alternative and more detailed classification, obligation might, first, be founded on a statute or express rule of law based on public policy or morality (and independent of fault or consent), *i.e.*, *ex lege*; secondly, obligation might be founded on fault, as in delict; and, thirdly, obligation might be founded on the will of obligants, as in contract.[17] This hierarchy of obligations is very relevant in the solution of problems which involve contract and delict. Though contract may increase or restrict the duties owed to actual parties to the agreement, such contract cannot logically restrict liability to third parties in delict or reparation[18]—which is owed under a more fundamental and general principle.

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[15] *Selected Papers*, 157–158, 182, 205–214.

[16] Stair, 1.3.2.; Bell, *Principles*, S.6.

[17] This threefold classification is brought out more clearly by Grotius (*infra*) from whom Stair borrowed extensively in treating obligations.

The first and basic category in the law of obligations, I have submitted, is logically that comprising duties imposed *ex lege* on grounds of policy and not dependent on fault or consent. In addition to such duties as those of aliment and quasi-contract, I would suggest that this category should include cases of quasi-delict. In the case of quasi-contract, an obligation to pay or deliver is imposed by law and not assumed by consent. It would seem logical to appropriate the term " quasi-delict " to cases where the defender is bound to pay damages *as if* he had been guilty of *culpa*. This, it may be thought, was the essential underlying idea in Roman law. The actual term *quasi-delictum* was unknown to Roman lawyers, but their examples of " *obligationes quae ex quasi delicto nascuntur* " are in essence cases of liability irrespective of personal *culpa*—even probably the *judex qui litem suam fecit* (the judge who gave a wrong decision) was originally in effect a layman (like a juror) subjected to strict or absolute liability. I need not traverse in detail the ground covered by Professor Peter Stein in a lucid and penetrating article[19]—in which he traces the emergence of the term " quasi-delict " and its appropriation by some civilians to cases of *culpa* in the narrower sense of negligence.

During the seventeenth and eighteenth centuries, the natural lawyers, who treated the categories of Roman law freely, maintained the principle long latent in the *jus commune* that any wrongful act or omission, deliberate or negligent, which caused harm created the obligation to make reparation. Thus for Stair[20] as for Grotius[21] there was no need to distinguish in delict between negligent and intentional—between *culpa* (in the narrower sense) and *dolus* as a basis of liability; both were aspects of the broader concept of fault. To this I shall return when discussing delict. Some loss, however, stood outside this principle of fault and was reparable, *quasi ex delicto*, but not on grounds of fault. As Stair puts it [22] when discussing the Praetorian Edict, "These obligations are rather introduced by statutory law for common utility than by natural obligation." Grotius, in his *Inleiding*,[23] refers to these and various other heads of strict or absolute liability under "*Van misdoed door wetduiding*" (of wrongs by construction of law). Unfortunately, subsequent theoretical writers such as van der Linden [24] and (perhaps) van der Keesel [25] on the Continent again went pursuing a distinction without a real difference, and appropriated the term "quasi-delict" to cases of vicarious liability and negligence (as contrasted with intentional wrongdoing). Heineccius [26] and Pothier [27] appropriated the term "quasi-delict" to damage caused by negligent as contrasted with wilful wrongdoing, a distinction which was un-Roman, undesirable, and unnecessary. Professor Stein considers that Bell, who is the only Scottish institutional authority to adopt this view, took it from Heineccius. I myself would suggest Pothier as another contributing source of Bell's classification.

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[18] Failure to appreciate the distinction between contract and delict resulted in the illogicalities of *Cameron* v. *Young*, 1908 S.C.(H.L.) 7; 15 S.L.T. 976, and of the cases relied on by the defender in *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31; S.L.T. 317.

[19] (1955) 4 I.C.L.Q. 356.

[20] Stair, 1, tit. 9; though the aspect of negligent wrong is not developed. McKechnie, *Introduction to Scottish Legal History* (Vol. 20, Stair Society) 273 *et seq*.

[21] *Jurisprudence of Holland* (ed. R. W. Lee), Book 3, Chaps. 32 and 37.

The identification of "quasi-delict" with negligence does not serve any obvious purpose. The reservation of the term "quasi-delict" for cases of liability for breach of absolute duties, statutory or otherwise, would have served a very practical purpose, since such duties have greatly increased since the time of Bell. Paradoxically, the trend has been for such liability to be classified as "negligence" —even in cases like *Millar* v. *Galashiels Gas Co.*,[28] where the mere fact that hoist brakes failed on one isolated occasion rendered the employers of the deceased workman liable in an action based on breach of the Factories Act. "Quasi-delict" would have seemed much more meaningful if reserved for such circumstances; the civilians of the seventeenth century knew better.

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[22] 1.9.5.

[23] *Op. cit.*, Book 3, Chap. 38.

[24] Institutes of Holland 1.16.6.

[25] *Theses Selectae*: S.804.

[26] *Recitationes in Elementa*—tit. 4 (SS. MXXXII–MXXXVIII).

[27] Obligations 1.1.2.2.

[28] 1949 S.C.(H.L.) 31, S.L.T. 223.

Passing now to the fate of the Scottish law of delict proper, I think the pattern of development up to the nineteenth century was very similar to that of the other countries of Europe which participated in the reception of the Roman law. But I speak with some diffidence pending the appearance of Sheriff Hector McKechnie's Chapter [29] in the Stair Society's *Introduction to Scottish Legal History* this year. Prior to the conscious reception of Roman law, redress for various forms of fraudulent and violent wrongdoing in Scotland and elsewhere in Europe was according to a variety of nominate customary remedies. When Romanisation came, the broad principles of liability in the evolved civil law were introduced without actually abolishing the old particular remedies. These latter, becoming obsolete, began to fade out and—but for English influences from the nineteenth century on which produced a new flood of nominate categories—we would probably have developed our law of delict (with minor reservations) simply on the broad bases of, first, the *actio injuriarum* and, secondly, the generalised action in respect of damage caused by fault derived from the *lex Aquilia*. Indeed, when we assert that our law of reparation provides redress generally for harm caused by *culpa*, it is to these two Roman actions that we must ultimately return.

It must be confessed, however, that we have pursued many strange gods and partly lost sight of the *actio injuriarum* properly so called. If *actio injuriarum* is one of the Roman law terms most used in Scotland, it is by that very fact the most abused. By what astonishing distortion of the Roman law has *actio injuriarum* come to be used to designate actions in respect of death or personal injury caused by Aquilian fault—with an element of *solatium* grafted from the old customary redress of assythment?[30] As Lord Kinnear noted, such an action (despite its name) is not connected with the Roman *actio injuriarum* at all.[31] *Injuria* in the Roman law had, of course, the basic meaning of unlawfulness "*Generaliter dicitur injuria omne quod non jure fit,*"[32] but in the *actio injuriarum* it developed the special meaning of *contumelia*, *i.e.*, deliberate insult or outrage to the person or dignity of another,[33] like following about a respectable matron in the street or (Mackenzie's[34] examples), calling a man a cheat or a woman a whore, or wearing in contempt what belongs to a man as a mark of honour (*e.g.*, wig and gown). One should, therefore, expect to find the influence of the *actio injuriarum* in Scots law in dealing with the problems of assault, insult and trespass on land in defiance of another's right. (The *actio injuriarum* would be relevant so far as *solatium* as opposed to patrimonial loss was concerned; actual financial loss would be attributed to Aquilian liability.) Though in part submerged, I think that the *actio injuriarum* in the proper sense is still relevant in Scottish practice in the contexts I have mentioned,[35] though I cannot do much more at the moment than assert it. Is there not time for second thoughts on topics such as *convicium*—which Lord Normand defended as still part of our law when he addressed the Oxford University Law Society in 1950? Perhaps the argument may still be open that *animus injuriandi* (which is of the essence of *actio injuriarum*) need not inevitably be presumed where the " common law " defences of privilege or fair comment cannot be established in an action based on insult. The general relevance of *animus injuriandi* has been reopened in South Africa [36] and in Ceylon, where the legal background of Roman-Dutch law influenced by English law is very similar to our own. In the Privy Council it was a distinguished English lawyer, Lord Uthwatt, who observed [37] " But it must be emphasised that those defences (*i.e.*, the common law defences of privilege and fair comment [38]) or more accurately the principles which underlie them, find their technical setting in Roman-Dutch law as matters relevant to negativing *animus injuriandi.* Decisions under the common law . . . do not necessarily work out rules under the Roman-Dutch law. The ' gladsome light of Roman jurisprudence ' once shone upon the common law; repayment to the successor of the Roman law should not take the form of obscuring one of its leading principles." These are welcome sentiments. The issue of *animus injuriandi* in the *actio injuriarum* (properly so called) was once very important in Scotland.[39] I may be permitted to digress upon one remarkable instance—that of *Memis* v. *Governors of Aberdeen Royal Infirmary* in 1776.[40] Dr. Memis sued the managers of the infirmary for deliberately, and to humiliate him, designating him in an official document as " Doctor of Medicine " instead of " Physician," as his colleagues were described. Boswell acted for the defenders and (as might be expected) picked Dr. Johnson's brains. Memis lost narrowly, and obviously had the sympathy of several judges, including the Lord President (Dundas of Arniston). I have seen a photostat of Boswell's note of the opinions (from the *Boswell Papers*) and was greatly impressed by the speed at which he wrote in long hand. He even finds time to interpolate as the Lord President was speaking "(here tears came into the old man's eyes)." I have not noted any record of judicial tendencies to the lachrymose in contemporary Session Cases Reports. Arniston very properly described the action as an *actio injuriarum*. Is it too late to return to the correct usage?

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[29] Now published; see note 20, *supra*.

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[30] Discussed Smith *op. cit.*, note 10, *supra*, 1071; also McKechnie *op. cit.*, note 20, *supra*, 276–277. The blending of Aquilian fault with redress for death or injury of a freeman was not (*pace* many dicta) a Scottish solution achieved without precedent. Contrast Stair 1.9.4. with Grotius *Inleiding*, 3.33.2;3.34.2 also *De Jure Belli ac Pacis* II c. 17, 13–14. See esp. Feenstra *Acta Juridica* (1958) 27.

[31] *Leigh's Exrx.* v. *Caledonian Ry.*, 1913 S.C. 838 at p. 847; 1 S.L.T. 373.

[32] See in particular Beinart, "Relationship of injuria and culpa," *Studi Arangio Ruiz* (1952).

[33] See in particular Daube, "Ne Quid Infamandi Causa," *Atti del Congresso Internazionale di Diritto Romano e di Storia del Diritto* (Milan) 1948, iii, 414.

[34] *Laws and Customs of Scotland in Matters Criminal*, Part I, Title XXX. See also Bankton 1.2.4.8.

[35] The concept of slander in Scots law includes, or may be accompanied by, insult in the sense of *actio injuriarum*, which is why *solatium* is given for the pursuer's wounded feelings, even though there be no publication to a third party. Guthrie Smith, *Reparation*, 242, uses *actio injuriarum* in the correct sense. See Lee's cross-reference to Scottish practice *Introduction to Roman-Dutch Law* (5th ed.), 335, also cases cited in Morison under title "Delinquency."

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[36] Compare Lee, *op. cit.*, 334–335; 329 *et seq.*; McKerron, *Delict*; Price, 66 S.A.L.J. 4.

[37] In an appeal from Ceylon *Perera* v. *Peiris* [1949] A.C. 1 at pp. 19–20.

[38] Parenthesis inserted by present writer.

[39] See Mackenzie, *op. cit.*, note 34 at p. 153, where he deals with " verbal injury." The origins of the wrong known today in Scotland as " verbal injury " are somewhat obscure; it only was clearly recognised in *Paterson* v. *Welch* (1893) 20 R. 744, has been elaborated only slightly since, and has never been adequately examined by Cooper on *Defamation* or by Glegg on *Reparation.* As the pursuer must in such cases establish patrimonial loss, but need not show insult, it might be thought that liability rests on *damnum injuria datum* by wrongful utterances. *Quaere*, could this principle be extended to negligent misstatements causing patrimonial loss?

[40] A short report is given in Morison, Appendix " Delinquency " No. 2.

But by far the most important foundation of the Scottish law of delict is liability for "fault," in accordance with the principles of the action developed from the *lex Aquilia*. As Stair puts it,[41] "obligations by delinquences . . . are either general having not particular name or designation" or special. Bankton observes [42] of our law of reparation that "it hath as many branches as there are ways whereby our valuable and reparable interests may be damnified, whereof divers instances are given in the titles of the Digest *ad legem Aquiliam*. It were tedious to particularise these; they are determined by the same rule namely 'That where damage occurs, through any fault of the person who occasions it, the same must be repaired to the person aggrieved.'" The duty of the *bonus paterfamilias* under the principles of the *lex Aquilia* was, not only to avoid inflicting deliberate harm, but also to take such care as was reasonable in the circumstances to avoid causing unjustifiable harm to others [43]; and it is almost breathtaking to hear Scottish lawyers referring to "the rule in *Donoghue* v. *Stevenson*" [44] as though it were a new principle in the law of Scotland. Far from it: the case itself struck off fetters of English origin which had been fastened on our doctrine of *culpa*; though, by recognising the applicability to Scots law of the peculiarly English doctrine of particular duty, the decision has restricted the principle of fault in a way which was unknown to our law before the very end of the nineteenth century—and is unknown in systems uninfluenced by English law.

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[41] 1.9.6.

[42] 1.10.41; see also Erskine 3.1.13 and Kames, *Principles of Equity* (4th ed.), 46–47.

[43] It is perhaps unfortunate that Professor F. H. Lawson's valuable comparative study should have been entitled "Negligence in the Civil Law." Aquilian liability and liability for "fault" in modern civilian systems are concerned with unjustifiable harm whether wilfully or negligently caused.

[44] 1932 S.C.(H.L.) 31; S.L.T. 317. The appeal, however, was argued against a background of English authority, which, though not in accordance with the basic principles of delict in Scotland, had to be neutralised and outflanked.

A re-examination of the Scottish law of delict against the background of the evolved *lex Aquilia* is indispensable for students, and the busiest practitioner, I suggest, would find much of value in such research.[46] A teacher of the civil law in a Scottish University has a special duty to denounce the strange gods, and to preach a return to purer doctrine. One may take encouragement from the fact that in the other uncodified system based on the civil law and influenced by English law, the law of delict is being re-examined both in decided cases and in learned articles and treatises. A more critical attitude is being taken than in the past to the citation of English cases on the tort of negligence as determining the limits of Aquilian fault. It is stimulating to read in the contemporary South African reports, for example, discussion of the *lex Aquilia* in dealing with situations where restricting "common law" doctrines had tended in the past to gain the same kind of tacit and unquestioning acceptance as in some of our own textbooks and dicta. The English law of tort may be barred for historical reasons from giving a remedy for pecuniary harm caused by negligent misrepresentation or by non-physical means generally, as was held in *Candler* v. *Crane Christmas & Co.*[47] (Lord Denning dissenting). That case is quoted in certain Scottish textbooks and articles; but whoever suggested that the law of England was derived from or ever developed principles as broad as those of the action evolved from the *lex Aquilia* (which is the foundation of liability with us)?[48] Before English authority came to be cited in such questions, Scots law in a number of cases extended the principle of fault to cover cases of financial harm caused by negligent fault of a non-physical nature. In South Africa this question has been reconsidered very fully in recent years with extensive citation of Roman, Institutional and English authority.[49] I am still hopeful that in an appropriate case the question will be reopened in Scotland as to whether negligent misstatement causing financial loss may not be actionable in Scotland[50]—and I hope that counsel for the pursuer is well versed in the evolved civil law. To describe, as the English do, a non-fraudulent but negligent statement as "innocent misrepresentation" seems to me as unjustifiable as to describe running down a pedestrian on the highway as "innocent bad driving." Both should surely found an action in delict; and surely in the field of contract a civilian system at all events should regard it as *dolus* to seek to enforce or maintain a bargain which had been induced by negligent or even "innocent" misstatement.

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[46] Apart from the basic texts, and textbooks, the following works in English are particularly relevant:

Lawson, *op. cit.*, note 43;
Grueber, *The Lex Aquilia*;
Daube, "On the Use of the Term Damnum" (*Studi Solazzi*);
Beinart, "The Relationship of Injuria and Culpa in the lex Aquilia (*Studi in onore di Vicenzo Arangio Ruiz*);
Dias, 13 Camb.L.J.; 30 Tul.L.R. 377; *Acta Juridica* (1958), 203;
Price (1949) 66 S.A.L.J. 171, 269; (1950) 67 S.A.L.J. 138, 257, 411; (1951) 68 S.A.L.J. 78; *Tydrskrif vir H.R.H. Reg.* (1950) 1, 87, 261.

[47] [1951] 2 K.B. 164.

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[48] Though, by contrast with English law, Roman law gave an action where *damnum* (*i.e.*, economic loss) resulted *nec corpore nec corpori*, not all scholars would go as far as Professor Price in assuming liability for negligent misstatements under the evolved Aquilian action. There is no reason, however, why the step should not be taken now in appropriate cases. See on this Ashton-Cross, 63 J.R. 199; Smith (1956) Butterworths S.A.L.R. 156 *et seq.*; Glegg, *Reparation* (4th ed.) 230.

[49] *Herschel* v. *Mrupe* (1954) (3) S.A. 464 (A.D.) is of particular interest for its discussion of liability for negligent misstatement. The dissenting opinion of Centlivres C.J. favouring the plaintiff is attractive. The majority who held for the defendant seem to have decided—not on a distinction between damage caused by non-physical as contrasted with physical means—but because in the circumstances there had been no failure to take reasonable care nor a situation creating a duty to do so. Contrast the views of McKerron on *Delict* (new ed. in press) and Macintosh & Scobie, *Negligence in Delict* (4th ed.) 4, with those of Price in Butterworths S.A.L.R. (1955) 154 and in articles quoted in 67 and 68 S.A.L.J. See also *Annual Survey of S.A. Law* (1956) 404, which indicates that *Herschel* v. *Mrupe* has not closed the door against liability for negligent misstatement in an appropriate case.

[50] Discussed by the present writer in "The Common Law Cuckoo," Butterworths S.A.L.R. 162 *et seq.* The arbitrary distinctions of English law, established by precedent, are not binding on Scots law.

Though the statement itself may not have been fraudulent, to take advantage of it would seem to me *pessimae fidei.*[51]

Further, must we accept without further examination the proposition, advanced by some as relevant for Scots law, that for omissions a man can never be liable in delict on Aquilian principles unless he first created a situation of foreseeable risk? A perusal of the decision in *Silva's* case [52] by the Appellate Division in South Africa may stimulate second thoughts on this problem.

Again, is there not very good purpose to be served in refurbishing the principle of *aemulatio vicini* (or what is popularly but not very happily called " abuse of rights ")? Despite Lord Watson's dictum [53] in an English appeal, there is ample Scottish authority—institutional and judicial [54]—for the proposition that he who acts purely maliciously to the prejudice of another, and not to advance any legitimate interest of his own, causes damage by fault and is liable to make reparation. His motive may thus transform what would otherwise be a justifiable act into an actionable wrong. Though the texts in the *Corpus Juris* do not state this doctrine explicitly, it has been accepted by many eminent civilians from medieval to modern times,[55] and it is incorporated into codified civilian systems of our own day.[56] One might have hoped to see this principle invoked in Scotland, not only in questions of heritable property, but—as elsewhere—in questions of unjustifiable harm inflicted in the economic field. Here again, however, as the *Crofter Harris Tweed Case* [57] well illustrates, we preferred to go whoring after some very strange gods. The Lord Chancellor began his speech by observing that it had not been suggested that the law applicable was any different in the Scottish law of delict and the English law of tort [58]; and proceeded to discuss the evolution of the crime of conspiracy in the English Court of Star Chamber! [59]

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[51] When contracts generally were clearly recognised as *bonae fidei* in Scots law, it was apparently regarded as " fraud " in the broad sense to seek to take advantage from a " bargain " obtained by statements which were not in themselves deliberately false—see Smith, *Laws and Constitutions of U.K.* (*Scotland*), 1022–1023 *et seq.*

[52] *Silva's Fishing Corporation* v. *Maweza*, 1957 (2) S.A. 256 (A.D.) The defendant, owner of a fishing fleet, was held liable for failure to take steps to rescue the crew of one of the corporation's boats, although the crew were not in their employment. It was held that the duty to rescue was not special or subject to peculiarly restricted rules: the duty was to act reasonably, and such a duty might arise (as it did here) out of the circumstances of the case.

[53] *Bradford* v. *Pickles* [1895] A.C. 587 at pp. 597–598.

[54] *Campbell* v. *Muir*, 1908 S.C. 387, 15 S.L.T. 737; Bankton 4.45.112; Erskine 2.1.2; Bell, *Principles*, S.964.

[55] See in particular a brief, lucid and comprehensive survey with full citation of civilian authority—Scholtens, " Abuse of Rights " (1958) 75 S.A.L.J. 39.

[56] *e.g.*, Germany B.G.B. S.226; Switzerland, Civil Code s.1. In France and the Netherlands, the same result is achieved by judicial construction without express provision in the Codes. The doctrine also applies in Italy—Dusi, *Istituzioni di Diritto Civile* (5th ed.), ii, 20.

Yet again, on delict. Is there any justification in the now commonplace " paper " division of liability for fault into " negligent " and " wilful " wrongdoing? [60] In modern times the equivalent trend in English law has influenced our own approach. The *lex Aquilia* itself did not distinguish between the two, and we have founded our general doctrine of liability for fault generally upon the *lex*. I have already suggested one reason for the drawing of a distinction without a substantial difference. Pothier distinguished between *délits* and *quasi-délits* [61] and this " paper " distinction will be found (without definition) in the title of the relevant chapter of the French Civil Code [62] (which was based on Pothier) and in Codes modelled on that of France.[63] In fact, however, as " *faute* " is the basis of liability in either case (as fault is the basis of liability with us) the distinction serves no useful end. This fact is appreciated, *e.g.*, in the modern Italian Code [64]—though, as I have submitted already, the category " quasi-delict " would be useful in our law to cover cases of liability independent of fault. Where fault (either *dolus* or *culpa* in the narrower sense) is the basis of liability, to quote Lord Justice-Clerk Inglis [65] (as he then was) " The same measure of reparation is due on the same conditions, and by the same form of action, whether the cause of the damage be the one kind of delict or the other." Lord Dunedin was searching for the same basic principle when he observed [66]: " I think that, therefore, for practical purposes, when we are dealing with liability, we may substitute the word ' fault ' for the word ' negligence.' That is what we find when we refer to the Roman system. I suppose that the proper translation of the word *culpa* is fault . . . to treat negligence as one thing and wilful misconduct as something entirely different is, I think, to look at the matter in the wrong light."

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[57] 1942 S.C.(H.L.) 1; 1943 S.L.T. 2.

[58] Viscount Simon L.C. at pp. 2–3. This is a particularly insidious method of subverting civilian principles by common law doctrines. In a Scottish appeal it seldom happens that counsel are qualified to express any expert opinion on English law, and a decision reached by concession of counsel regarding the relative doctrines of Scottish and English law may be regarded as of doubtful validity as a precedent.

[59] pp. 9 *et seq*. *Non constat* that, the criminal law of Scotland and England coincide in the field of " conspiracy." The illogicality of the tort in English law is recognised by the Lord Chancellor at p. 8. A solution through the doctrine of abuse of rights would have been more in keeping with Scottish theory.

[60] See p. 126, *supra*. The present writer admits that in earlier writings he fell (in good company) into error on this point.

[61] *Obligations* 1.1.2.2.

[62] Liv. 3, tit. 4, Chap. 2.

[63] *e.g.*, Quebec S.1053; Louisiana S. 2315–2316.

[64] S.2043.

There is no time for me to examine the fragmentation of our broad concept of *culpa* or fault under the impact of the English common law—as, with regard to animals, the so-called rule in *Rylands* v. *Fletcher*,[67] and the liability of occupiers and lessors of heritage.[68] In passing I may be permitted to note that the English categories of invitee, licensee and trespasser which (reversing the First Division) were thrust on our law by the House of Lords in 1929 [69] are still with us. The legislature found time to tidy up the equivalent sections of English law by the Occupiers' Liability Act, which came into force on January 1 of this year [1958].

Time prevents me from examining similar trends of subversion of our civilian tradition in other branches of obligation. So far as unjustifiable enrichment and restitution are concerned, the basic principles stand firm,[70] despite some infiltration of the very fluid English trust concept which serves in their law to eke out the inadequacies of quasi-contractual remedies. In the field of contract superficial similarities of the Scottish civilian tradition and English doctrines may conceal differences of principle which are not always appreciated in time. Eminent English and American writers have stressed the danger of assuming that a sound principle in the civil law can be successfully transplanted to the " common law " of contract.[71] Is it not time to go back to the civilian fundamentals in Scotland, and check our position in such matters as penalties, breach of warranty of authority, frustration, vices of consent (such as fraud and error), the differing effects of contract and transfer of real rights, the relevance or necessity of additional sub-categories like undue influence and " innocent misrepresentation "?[72] If, as I believe is the case, the generalised theory of contract which we took over largely from the civil and canon law was—with certain exceptions—of contracts *bonae fidei*, must we not be exceptionally careful to avoid generalisations from the modern contract of sale—where a United Kingdom statute has interposed to assimilate the laws of Scotland and of England, in which latter system good faith was never a general concept? I venture to suggest that when our civilian heritage was more clearly appreciated in practice, the obligation of *bona fides* in contract was general, but, of course, would require a heavier or lighter

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[65] *Liquidators of Western Bank* v. *Douglas* (1860) 22 D 447 at pp. 475–476.

[66] *Bastable* v. *N. B. Ry.*, 1912 S.C. 555 at pp. 565–566; 1 S.L.T. 259.

[67] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

[68] The writer's views on these various points are developed in *The Development of the Laws and Constitution of the U.K.* (*Scotland*), Vol. 1 (British Commonwealth Series) at pp. 1073 *et seq.*, 1115 *et seq.*

[69] *Dumbreck* v. *Addie*, 1929 S.C.(H.L.) 51; S.L.T. 242.

[70] The potential scope of these principles may not be fully realised; and considerable assistance can be obtained from the South African authorities. See, *e.g.*, Rubin,

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Unauthorised Administration in South Africa, and an article by Dr. W. de Vos on " Unjustifiable Enrichment " which is to appear shortly in *The Juridical Review*.

[71] *e.g.*, Williston, *Contracts*, " Intent to Contract," S.21.

[72] It might be thought, for example, that the appropriate remedy against the ostensible agent should be in delict; and that the categories of error and fraud with the concept of good faith should suffice without the need to invoke " innocent misrepresentation " and " undue influence " as separate categories. The present writer's provisional thoughts are set out in *op. cit.*, note 68 at pp. 1006 *et seq.* These views gave insufficient attention to the problem whether, *esto* a contract might be annulled, this should necessarily make an actual transfer of property vulnerable. The older Scottish authorities deal with sale *as a contract* only. A valuable assessment of the doctrine of *justa causa traditionis* is to be found in Professor J. E. Scholten's article " Justa Causa Traditionis—Contracts induced by Fraud." *Cf.* Bell's *Principles* (4th ed.), Note to sections 11, 12 and 13—where a distinction is made between the effects of error or fraud on contract as contrasted with conveyance or delivery of corporeal moveables.

duty of disclosure according to the circumstances and species of agreement. The appearance of the English term "*uberrima fides*"—using (ironically enough) the superlative form instead of,[73] as formerly *bona fides*, in contracts such as insurance—merely indicates the influence of a system where good faith was not generally received. Again, especially under the influence of dicta pronounced in the House of Lords in an era before Scottish judges participated in Scottish appeals, we are in danger of confusing and frustrating one of the most valuable doctrines of our law of obligations—the unilateral juristic act by bare promise or *pollicitatio* (as contrasted with contract or agreement). This doctrine appears in limited form in Digest 50.12, was developed by canonists and natural lawyers and was most fully considered by the Pandectists in nineteenth-century Germany. The generalised idea that a man can be bound by his unilateral declaration of will—without the requirement of acceptance—was defended by Stair against Grotius, as I have argued fully elsewhere.[74] Ironically, the Continental systems which tended in the past to follow the view of Grotius are now coming to accept the value of the concept of the unilateral juristic act in contexts such as advertisements of reward and the *pactum in favorem tertii*—while we in Scotland seem in danger of stultifying the achievements of our civilian tradition. In particular, I throw down the gauntlet to those who assert that the beneficiary under the *jus quaesitum tertio* cannot sue for damages for faulty performance.[75] His right is based on the promisor's unilateral declaration of will—which in itself has been regarded since before the time of Stair as a binding obligation quite as much as contract. It was perhaps too much to expect the English lawyers in the House of Lords in the middle of the last century to appreciate this point. Their dicta denying damages for faulty performance are, fortunately, *obiter*.

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[73] *Cf.* Millner (1957) 74 S.A.L.J. 188 *et seq.*

[74] See "Pollicitatio—Promise and Offer," *Acta Juridica*, 1958, 141; also Ashton-Cross, 1957 J.R. 138 at 147.

[75] See *Jus Quaesitum Tertio*, 1956 J.R. 3.

But it would take a whole course of lectures to dissect the anatomy of our laws; to demonstrate the healthy and identify the pathological. We have not always remained, either, faithful to our understanding of that tradition of the civil law which we inherited, and we have often gone awhoring after common law solutions to the detriment of our law. In the mid-twentieth century, let us not blame Parliament too much for forcing " common law " solutions on us. Our trouble is to get Parliament to pass even urgent measures of law reform as in questions of succession. Though it was not always so, neither the legislators nor the judges of the House of Lords today would *willingly* overrule a principle of Scots law. They are, however, quite often prepared to assume that Scots and English law are identical unless convinced to the contrary. In this connection, the busy practitioner must use the readiest tools to hand, and these, whatever their jurisprudential origin, civilian or common law—Scots or English—will tend to mould the development of our law. If our law faculties fail to provide adequate literature in the civilian tradition, they are accessories to its destruction. In the last resort, therefore, I contend that the future of Scots law as a civilian system is entrusted to those whose duty it is in the law faculties of our universities to write and teach.

The students of today are those who as judges and practitioners will determine how our law will develop. The Professor of Civil Law has them for all too short a time and he cannot (as Professor Fisher has often stressed) afford to concentrate too much on the antiquarian aspects of his subject—however justifiable this might be in England or in countries where codification has taken place. The intrant's petition for admission to the Faculty of Advocates in Scotland narrates that he has applied himself to the study of the civil law and the municipal laws of this Kingdom—certainly implying the *modernus usus*. " Our Law," said Lord Kames,[76] " is grafted on that of old Rome, which accordingly is made the first stage in law education. The

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[76] *Elucidations*—Preface.

Roman law is illustrious for its equitable rules, affording great scope for acute reasoning." Yet his Lordship deplored that, apart from Professor Millar in Glasgow, those who taught civil law in Scotland during the eighteenth century adopted an excessively antiquarian approach to the subject. His Lordship continues[77] "What use, for example, to our students is the chapter, *De lege Fufia Caninia tollenda*, or the chapter, *De excusationibus tutorum et curatorum*, or the intricate rules that concern pactions, or for a thousand other particulars that have no relation to any modern law, none at least to the law of Scotland? They load the weak mind with a heap of uninteresting facts, without giving any exercise to the judgment. Is it surprising, that the Roman law, so taught, is held to be a dry and fatiguing study? Is there no cause to fear, that many of our law students, contracting an aversion from study in general, will sink into idleness, and prove no less useless to themselves than to their country? Are there no traces to be discovered of this malady? Many, many.

"A Scotch professor of Roman law ought to be well acquainted with the law of his own country, so as in every lecture to point where our law differs from that of old Rome. A course of such lectures, carried on with spirit and discernment, would draw great attention: the student whose immediate object was the Roman law, would be surprised to find the advance he had made in that of his own country."

In other jurisdictions where the Anglo-American "common law" has threatened the viability of the civilian tradition, I have had the privilege of witnessing the leading part taken by the law schools in vindicating and reasserting the civil law. The flourishing legal literature and journals of South Africa and Louisiana are based on the law schools, and have had a notable effect on the course of legal development in recent years. The main strength of the movement to reassert the civilian tradition in Louisiana is however, in my view, the Louisiana State Law Institute—a well-endowed official organ of legal research and law reform based on the University Law Faculties, and combining the efforts of legal scholars, judges and practitioners. It is my most earnest hope that one day we in Scotland shall see a Law Institute of Scotland, fully equipped with staff, library and other means for research and writing and dedicated, in accordance with contemporary social and economic needs, to develop our laws within the great civilian tradition which we have inherited.

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[77] *Ibid.*

Lord Normand has already set forth the crisis of Scots law as a civilian system in our own times in very clear terms[78]: "We have in the tradition of Roman Law a vast and unexhausted treasure-house of principle, highly rationalised and deeply humanistic, which we must not neglect if we are to maintain the identity of Scots Law in the necessary changes and modifications of the future. For unless our law continues to grow in accordance with that tradition it will run a grave risk of becoming a debased imitation of the Law of England, stumbling and halting before every new problem where we have no English precedent to guide us. From that fate our law students and future practitioners can save us by a right appreciation of the Roman tradition in the Law of Scotland and by accepting it as an active principle of natural growth and development."

But even more urgent than material means is the need for men and women willing and qualified to take their part in those heavy labours of scholarship which alone can achieve this end. We are fideicommissaries of the past and fiduciaries for the future. It is in the hearts and minds of Scottish lawyers, those who will enter on their careers during the next twenty-five years, that the issue will be determined whether Scots law will survive as a civilian system. If the battle is lost the blame must rest on those who, like myself, are entrusted with their legal education. In all humility but with enthusiasm and determination I dedicate myself to fight that battle against apathy and false gods.

T. B. SMITH.

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[78] Foreword to *Roman Law* by J. Spencer Muirhead.

THE SUPREME COURT AND AMERICAN ECONOMIC POLICY

AT first blush the relation of the American Supreme Court to American economic policy may seem to be one of inexorable warfare. The observer with a bent for history will recall the Legal Tender Cases, when an adequate currency was assured only after two new appointees to the court joined in 1871 in overruling a contrary decision of 1870; he will think of the Income Tax Case of 1895, holding the federal income tax to be a direct tax and hence unconstitutional, thus foreclosing an adequate revenue system until the constitutional amendment of 1913; and he will remember the child-labour case of 1921, upsetting a federal law which prohibited the interstate shipment of child-made goods, on the ground that the law was not truly a regulation of commerce among the states.[1] The observer dependent on his own memory may recall the swift sequence of Supreme Court negatives in the early days of the New Deal, followed abruptly in 1937 by a series of saving decisions: "saving" not necessarily in the sense of the contemporary quip that a switch in time saved nine.

The court has indeed much to answer for. Why, then, is judicial review in affairs of the economy tolerated at all? An obvious answer is that the federal system requires an arbiter removed from the law-making branch of either the central government or the states. Today the value of review lies in its check on the parochialism and self-interest of individual states, and review of the central government gives symmetry and fairness to the system. More fundamentally, the Founders took a dark, or at least a guarded, view of human nature when it is vested with coercive power.

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[1] *Hepburn* v. *Griswold* (1870) 8 Wall. 603, overruled by *Legal Tender Cases* (1871) 12 Wall. 457; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), overruled by *U.S.* v. *Darby*, 312 U.S. 100 (1941).

Remarking on the philosophy of the American Bill of Rights, Sir Ivor Jennings has recently said: " Possibly the Americans are so hysterical about their handful of Communists, because they realise that they cannot in accordance with the rules of their Constitution handle a movement for widespread resistance to lawful authority. The Constitution assumes that the people of the United States are good, solid law-abiding citizens who are completely trustworthy until they become politicians." [2] Part of this observation will surprise Americans who are familiar with the bulk of statutory law on treason, sedition, conspiracy to overthrow the government, registration of foreign agents, and all the various offences which can properly be regarded as " widespread resistance to lawful authority." But it is true enough that the Constitution deals with restraints on law-makers and regards them as not " completely trustworthy." Indeed the whole constitutional scheme, including its checks and balances and the complex provision for its own amendment, is one that studiously avoids placing complete confidence in any group of office-holders. It is comparable to the notion of the gold standard suggested by John Maynard Keynes, that it is intended to safeguard against the managers of the currency all going mad at once.

But why are the limitations enforceable through the courts? I have suggested one answer—that a law-making body ought not to be the judge of its own conformity to the higher law of the Constitution. This answer does not quite suffice, perhaps, for cases where the departure from the higher law is by administrative officials who could be made answerable to the legislature. Let me suggest a very practical reason for the position of the judiciary. In America, at any rate, access to the courts is more orderly, reliable and expeditious than efforts to gain the attention of Congress amid its multitude of responsibilities. The wholesale merchant who is taxed by his state on his sales to a retailer in another state, and who contends that thereby interstate commerce—or in current terminology the common market—is being invalidly burdened, is not required to gain the ear of his Representative or Senator, who in turn would have to gain the attention of the House, which in turn would have to ascertain the facts and form a judgment not incongruent with its position in comparable cases. The merchant need not organise a lobby in Washington or write letters to the press or assemble a meeting of protest. He engages an attorney and presents his case to a court; ultimately, if the constitutional grievance is serious enough, to the Supreme Court of the United States. In the same way, dissatisfied persons and firms challenge all sorts of taxes and regulations of state and nation, so that the courts, and in the last resort the Supreme Court, are continually drawn into the shaping of the economy in the process of deciding lawsuits, and deciding them nominally by interpreting a few clauses of the Federal Constitution which are bafflingly silent on all the specific questions that have to be resolved.

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[2] Jennings, *The Approach to Self-Government* (1956) 104.

It is an appalling responsibility. How has the Supreme Court met it; how is the court meeting it; and what of wisdom can be distilled from the experience?

It is necessary at the outset to draw a distinction beween two kinds of challenges to economic legislation. The first assails a measure as beyond the competence of government; the second attacks a measure as beyond the competence of that government which enacted it. The first is commonly based on the guarantee of life, liberty and property against deprivation without due process of law; the second is based on the distribution of powers between nation and states, and frequently centres on the commerce clause.

Let me turn to the first of these. It was inevitable that the " liberty " of the Fifth and Fourteenth Amendments should be construed to include liberty of contract. It was less inevitable that " due process of law " should be construed to embrace not merely procedural standards but substantive considerations as well. Be that as it may, the substance of legislation has long since come within the ambit of judicial review under this classic phrase by Coke out of Magna Carta and its sequels. There is no need to rehearse the long list of judicial negatives on legislation that reached their climax in the 1920s and early 30s. To be sure, many kinds of economic measures succeeded in passing muster: antitrust laws, usury laws, zoning laws, industrial safety laws, control of rates of public utilities and insurance companies. But beyond the pale of legislative interference were the price term in contracts of sale and the wage and hours term in ordinary employment, together with the employee's agreement not to join a labour union. To us these seem now only faint echoes of battles long ago, whose outcome has in each instance been reversed. But without stirring the cold embers of yesterday's fires, it may be worth while to recall the judicial techniques which judges of varying persuasions have brought to bear on these problems; for in each area of judicial review the basic issue is the technique—the mode of approach or the focus—with which the judge confronts and views the controversy before him.

In the area of which I am now speaking—where the challenge is to any governmental power—the prevailing approach in the era of the judicial veto was through a formula something like this: Liberty of contract is the rule; restraint is the exception; restraint may be justified under the police power, which is a power to legislate for the general health, safety and morals of the community. Hence such interferences as sanitation laws, safety appliance laws, anti-lottery laws, and the prohibition of intoxicating liquor, were conveniently upheld. As for laws like those preventing the maintenance of billboards on the streets and highways, the aesthetic motive was discreetly ignored and the justification was found in the menace of such structures to safety or their supposed adaptability as hiding places for vice and crime.[3] Thus, the purity of legal doctrine was preserved by merely adding to the conventional formula of the police power an adequate dash of disingenuousness. This, after all, is one of the modes of growth in the law.

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[3] *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917).

As for such measures as antitrust laws, history was vouched to warrant their good character. But for price and wage laws no warrant could be found save as applied to businesses "affected with a public interest," a class described on the authority of Chief Justice Taft as comprising only three categories: public utilities, enterprises like inns and grist-mills where history again reared its helpful head, and a final embarrassing group, composed mainly of banks and insurance companies, which could be "deemed" to have been dedicated to a public use.[4] Of course the psychologist will say that these elaborate formulations of exclusion and inclusion were the transparent rationalisations of a mind bent on results. However that may be, we have the story of Mr. Justice Holmes' analysis of his colleague Mr. Justice Peckham, who wrote the opinion holding unconstitutional a ten-hour maximum working day in bakeries: Peckham's major premise, said Holmes, was "Goddammit."

The major premise of Holmes himself was quite different. If we retain the category of the profane, it could be described as a very tolerant "O hell." He put it more elegantly, of course. In the bakers' case he dissented memorably, saying, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[5] Earlier he had said: "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law."[6] And in 1927, in a case which held unconstitutional a state law regulating the commissions charged by theatre-ticket agencies, Holmes' dissenting opinion paid its respect to the philosophy of the majority in these blunt terms: "[The] police power is often used in a wide sense to cover and . . . to apologise for the general power of the legislature to make a part of the community uncomfortable by a change. I do not believe in such apologies. I think the proper course is to recognise that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."[7]

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[4] *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923).

[5] *Lochner* v. *N.Y.*, 198 U.S. 45, 75–76 (1905) (dissent).

If this expression is taken literally, it would be difficult to support any decision overturning a law on substantive grounds under the due-process clause. And yet Holmes himself on occasion joined in such decisions and was even known to write the opinion for the court. In the end even Holmes' counter-formula was not an adequate solvent; somehow the responsibility of judgment remains; the major premise has got to contain some suitably elastic term, if only one so vacuous as "a not wholly unreasonable restraint."

It remains to notice one more contribution in the field of due process and economic legislation, that of Mr. Justice Brandeis. His instinct for the concrete, his passion for facts, was like another's passion for beauty. At the Bar he developed a technique for arguing the validity of economic legislation, consisting of a massive assemblage of facts and opinion and legislative precedents to show that the challenged law could not in conscience be regarded as unreasonable. The conventional maxim that a law is presumptively constitutional had too often been taken lightly ; his formidable arraying of supporting data—running to several hundred pages in his brief for the validity of maximum hours of labour for women—served to bring the presumption to life. On the Bench the Brandeis brief became the Brandeis opinion, heavily freighted with documentary matter into which his colleagues had to rub their noses. Mr. Justice Holmes was never reconciled to this. " I cannot think that footnotes have a proper place in opinions," he complained. But Brandeis might have replied as did the wife of President Eliot of Harvard, quite deaf in his late years, when he complained that he could not hear the minister's prayers in church: " My dear, they were not addressed to you." It is sometimes said that the Brandeis brief brought a scientific approach to constitutional questions. I think this rather misconceives the nature of the device. It was not calculated to present the evidence for and against, but only for, on the ground that the proponents of the law need not demonstrate its wisdom or necessity but only that it was not palpably unreasonable or baseless. The Brandeis brief, in advocacy or judicial opinion-writing, is not so much a scientific as a forensic invention. It forced judges to recognise facts of life which they should have perceived as men of the world but which too often they did not deeply apprehend, or chose not to apprehend. The Brandeis brief served in a way the need which Shelley invoked in his defence of poetry: " We want the creative faculty to imagine that which we know."

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[6] Holmes, *Collected Legal Papers* (1920) 295.

[7] *Tyson & Bro.* v. *Banton*, 273 U.S. 418, 446 (1927) (dissent).

Certain reservations about the Brandeis brief ought to be mentioned. For one thing, as I have tried to suggest, it is in principle adapted to the support of legislation, not to its overthrow, since it is a buttress for the presumption of constitutionality. For that reason the use of so-called sociological data in the court's opinion in the school-segregation cases seems to me an inappropriate use, unless it is made clear at the same time that the presumption in favour of constitutionality does not operate in the case of racially discriminatory laws. Moreover, by inviting proponents of the validity of legislation to assume the burden of a factual showing of reasonableness, the Brandeis brief may possibly serve to weaken the presumption of constitutionality. Mr. Justice Brandeis was aware of this dangerous paradox. In one case, where the court was prepared to sustain a law fixing the commissions of insurance agents, and he was assigned the writing of the court's opinion, he resolved to rest the opinion entirely on the presumption and the absence of countervailing factual data in the presentation of the opponents.[8] But his law clerk, who tells the story, had been so habituated to economic research for the Justice (the law clerks came to move expertly through the labyrinthine ways of the Library of Congress) that he busied himself gathering data on the business of insurance agents; and in deference to the law clerk's diligence the Justice inserted the familiar footnote references to the facts of the business, thus vitiating, as the law clerk recognised in retrospect, the strategy for revitalising the presumption of constitutionality.

So well had the court learned its lesson over the years that until the 1956 Term it could have been said that since 1937 no purely economic measure had been held unconstitutional by the Supreme Court on Fourteenth Amendment grounds. The case which broke the spell seemed innocuous enough. As a carry-over from the depression, so-called currency exchanges have been operating in retail stores, cashing checks for a fee and issuing money orders. The state of Illinois subjected them to various regulations designed to protect the public against irresponsible firms, but exempted the Western Union Telegraph Company and the American Express Company. So far as Western Union was concerned, the exemption was held to be justified because the company is under the supervision of a federal commission; but the exemption for American Express was held to violate the equal-protection clause.[9] Whatever one may think of the result (it was reached over a strong dissenting opinion which pointed out realistically the distinguishing character of the American Express enterprise), the use of the equal-protection clause is a reminder that, broad as is the authority of government over economic affairs, irrational discrimination is still a fatal flaw. Sometimes by doing less than it might a legislature does more than it may.

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[8] *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251 (1931).

[9] *Morey* v. *Doud*, 354 U.S. 457 (1957).

It is time to pass from this relatively simple and, today, untroubled area of liberty of contract and due process of law to the more complex issues posed by the federal system. Here, too, one finds the court seeking comfort in formulas but more often finding it in facts. The American common market must cope with two kinds of local protectionism: regulation and taxation. Each has been a source of trouble and a breeder of litigation.

To take up regulation first. The court began to assert its authority in 1824, in the celebrated case of *Gibbons* v. *Ogden.*[10] In retrospect it appears an easy case. New York had granted a monopoly of water carriage by steamboat on the waters of the state to Livingston and Fulton and their assigns. A rival enterprise, plying the waters of the Hudson River between New York and New Jersey, was challenged as in unlawful competition under state law; but the rivals in turn assailed the New York grant as in violation of the constitutional power to Congress to regulate commerce among the several states. If ever the court was to imply a negative on state action in the silence of Congress, this was the right occasion. The monopoly effectively foreclosed water transport carried on by others between New York ports and points in other states; and what New York did, other states could and did go and do likewise, by way of retaliation, conferring monopolies of their own and thus forestalling through traffic on interstate waters.

But what of other less obvious or less substantial impediments to transportation and trade? What of state quarantine laws or steamboat equipment laws applied to incoming vessels? Could the answer be found simply by classifying the law as a regulation of health and safety, and not a regulation of commerce? What of pilotage laws? Surely in candour all of these must be recognised as regulations neither of safety alone nor of commerce alone, but of both. The court reached the beginning of wisdom when it perceived that the verbal categories implied a judgment: the categories were rather the end than the commencement of the process of decision. Some subjects, the court reasoned, permit of diversity of commercial regulation and may be left to the states; some require uniformity and if regulated by government at all must be reserved to Congress.[11] Even this proved too crude a test. Not only must the subject be considered (pilotage or quarantine or ship construction); more closely, the court must weigh the intensity of the law's effect on commerce against the intensity of the local need. Such a calculus requires more than an examination of the law on its face and a generalised judgment regarding it. It requires, or may require, an assessment of the actual conditions—the local need or hazard, the physical or financial burden on commerce, and the probable effectiveness of the law in achieving its purpose. This kind of assessment, of course, goes far beyond the limited function of the court in the due-process cases; in the common market no state may treat itself as an island.

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[10] (1824) 9 Wheat. 1.

All of this is illustrated in the case of the train-limit law, by which the state of Arizona undertook to fix the maximum length of freight trains at 70 cars.[12] The case produced a record of six volumes of testimony and exhibits. On the score of hazard, the record was addressed to the dangers of accident due to the bumping of cars in a long train as against the dangers through the meeting and passing of shorter trains, taking account of the topography of the state. On the score of the burden on commerce, the evidence was addressed to the existence of switching and siding facilities and the cost of constructing them for change-overs in the length of trains entering and leaving the state; the effect of break-ups on train schedules; and the probable effectiveness or ineffectiveness of the law as indicated by statistics of accidents in states with comparable topographic and traffic characteristics. In the end the Supreme Court decided that the law was unconstitutional. The court was able to distinguish state laws requiring certain minimum numbers of personnel (full-crew laws), on the ground that the safety factor was clearer and the cost and inconvenience to commerce much less.

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[11] *Cooley* v. *Board of Port Wardens* (1851) 12 How. 299.

[12] *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

One other illustration from the field of state regulation may be of interest. The city of Madison, Wisconsin, required that milk sold in the city be pasteurised within a radius of five miles at plants inspected by Madison officials. The interest of local health was clear enough; so, on the other hand, was the countervailing burden on commerce, for no milk from out-of-state bottling works could qualify for local sale. In these circumstances it became decisive to consider whether the objective of safeguarding local health could be achieved by means less drastically levelled at the common market. There was evidence that the National Public Health Service had issued standards for dairies and was prepared to make periodic inspections; the court concluded that assurances of that sort, which would be compatible with the common market, should suffice, and accordingly the Madison ordinance was ruled invalid.[13]

Most of constitutional law could be written around the milk industry. It should not be surprising that a similar case arose in Northern Ireland, as a result of a local ordinance requiring milk to have been produced on dairy farms certified by local inspectors, thus effectively shutting off the importation of milk from Eire.[14] Was this ordinance compatible with the organic Act of Northern Ireland, which reserved to the British Parliament the subject of trade between Northern Ireland and places outside? There are, of course, differences between this case and the American. There was here no question of a common domestic market (though it should be said that in America the states are under restrictions as to foreign commerce as strict as those governing interstate commerce); and there was not available here a supra-state agency like the National Public Health Service. The result—the upholding of the local law—may well have been ordained under any test. Yet the approach of the House of Lords, extracting from the law its " pith and substance," and classifying it as a regulation of health rather than of trade, does seem at variance with the American approach. Indeed it more nearly resembles the American approach of the mid-nineteenth century, where the Supreme Court decided by classifying laws on their face, not perceiving that the laws were Janus-faced, and not recognising that, as a basis of classification, purpose or motive or partial effect may be less reliable than a more pragmatic definition in terms of ascertaining the consequences and making a balanced judgment upon them. For it is of the essence of the pragmatic temper to arrive at the meaning of a proposition (" This law is invalid as a regulation of trade ") by comparing the consequences of its affirmation and its denial.

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[13] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

[14] *Gallagher* v. *Lynn* [1937] A.C. 863.

The court has been somewhat less successful, it seems to me, in dealing with local taxation—in weighing, that is, the claims of states and municipalities to an adequate revenue and the countervailing claim of the integrity of the national market. From the beginning the court has searched for general formulas which would resolve these claims. A state may not tax " imports." When does an import cease to be an import? Is the family silver, brought to America from the United Kingdom, to be forever immune from local property taxation? Chief Justice Marshall found refuge, in typical lawyer's fashion, by borrowing a concept from another branch of the law—the concept of " breaking bulk " in the law of larceny, or the " original package " doctrine, as it has come to be known in constitutional law.[15] The mechanical quality of all such solutions is only too evident, and yet the more particularistic approach of the " regulation " cases is hardly feasible for reviewing state taxation. The court cannot weigh the revenue needs of a state ; it has no guide lines for judging the actual burden on interstate commerce, so long as the tax is not discriminatory ; and in any event it cannot control the rates of taxation. The net of the court is understandably coarser here, the generalisations often more formalistic, as in the rules that a state may not levy a tax " on " interstate commerce but may measure a tax by the proceeds of interstate commerce.

A certain degree of realism creeps into the analysis of a proper measure or base of the tax, since it is understood that a state should not be permitted to tax more than its fair share of the property or the business of a multistate enterprise, and to that end the court insists on the state adopting an allocation formula. The formula may consist, for example, of fixing the taxable capital of a firm within the state as that percentage of the firm's total capital which the tangible assets and the receipts within the state bear to the total tangible assets and receipts of the firm.[16] Thus far, however, the court has refrained from imposing on the states any model formula for the allocation. It has been content to pass on the fairness of the formulas which the several states have adopted. To a rigorous economic mind this attitude may seem too tolerant, for where different factors are weighted differently in different states the result may be to produce an aggregate tax value for a multistate enterprise considerably greater than its actual value, thus defeating the very purpose of an allocation formula. To this it may be answered that the role of the court is at best an imperfect one ; since the court cannot control the rate of taxation in a state or the valuation of property there (assuming always no discrimination against interstate enterprise), the risk is inevitable that a firm will be taxed more heavily because it does business in several states than if it confined itself, with an equal volume of business and property, to a single state.

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[15] *Brown* v. *Maryland* (1827) 12 Wheat. 419. A century later Mr. Justice Cardozo took occasion to say that "the test of the original package is not an ultimate principle. It is an illustration of a principle." *Baldwin* v. *Seelig*, 294 U.S. 511, 526–527 (1935).

[16] *e.g.*, *Adams Express Co.* v. *Ohio State Auditor*, 166 U.S. 185 (1897); for an adaptation to the taxation of aircraft, see *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U.S. 590 (1954).

This answer is not, of course, conclusive: the fact that the court cannot wholly succeed may not justify it in doing less than it can. But the inherent limitations and frustrations of the court's task in the field of taxation may at least explain its failure to essay more actively the role of economic censor. The grosser forms of hostility and impediment to the common market through local taxation are in fact prevented by the court. Refinements would require a tribunal with power not merely to allow or disallow but itself to set maximum rates of taxation and supervise the valuation of property. Such a power is manifestly not appropriate for the judiciary; and it is not likely, as a political matter, that a power which cuts so deeply into the fiscal tissue of the states would be entrusted to an administrative agency of the national government. An alternative arrangement would be to vest exclusive authority to levy certain kinds of taxes in the Federal Congress, with distribution of proceeds among the states; but the experience of other federations along these lines is a reminder that the consequences for a harmonius working federalism may be serious indeed.

If one views broadly the work of the court in the maintenance of a free national market, one must acknowledge, I believe, that the court has played a significant, indeed an indispensable, role. It has been most successful when it has eschewed abstractions and merely verbal touchstones and has come to a judgment on the facts, recognising that the problem is to accommodate local concerns and the interest of the national economy. Sometimes, as in the case of state regulatory measures, this has entailed extensive evidence and bulky records; sometimes, as in the case of taxation, a more generalised judgment has been reached regarding various kinds of taxes.

So far I have dealt with the economy and the court from the standpoint of maintaining the constitutional order. But the national market depends not merely on freedom from unreasonable local governmental restraints. It depends at least as much on freedom from unreasonable private restraints. At this point, enter the antitrust laws of Congress and the courts as their ultimate interpreter. This is not the occasion to survey the tangled thicket of antitrust law, and certainly I am not a licensed guide through that domain. At best I can only suggest how the courts have gone about their task of mapping this rough country.

The antitrust laws consist of two main strands, comparable to the British monopolies legislation of 1948 and the restrictive practices law of 1956. The Sherman Act of 1890 is the general basic law, which prohibits contracts, combinations and conspiracies in restraint of interstate or foreign commerce and prohibits monopolisation of, and attempts to monopolise, any portion of that commerce. The more particularised prohibitions are found in later legislation, the Clayton and Federal Trade Commission Acts of 1914 and subsequent amendments; this group of laws is aimed at such restrictive practices as tying agreements and exclusive-dealing arrangements, where the effect may be substantially to lessen competition in any line of commerce. The two sets of laws—Sherman Act and later legislation—to some extent overlap, and the overlap extends to the mode of enforcement. In general the Sherman Act is enforced by the Department of Justice through the courts, the later Acts by the Federal Trade Commission through administrative proceedings reviewable in the courts; but the same practices may constitute offences under both sets of laws.

The Sherman Act, Chief Justice Hughes observed, "[a]s a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." [17] It is not surprising that the Supreme Court has responded to the Sherman Act very much as it has responded to its constitutional role, feeling a tropistic attraction to ready-made formulas or rules of thumb but finding that these are not an adequate substitute for fuller economic analysis.

The court has in fact classified certain practices as unreasonable restraints of trade *per se*: horizontal price-fixing agreements, for example. To be sure, such practices might be found in the long run and in some circumstances to promote competition, as by attracting new firms to the market or reducing selling costs. It could even be argued, as the late Professor Schumpeter of Harvard maintained, that what counts for the competitive system in the long run is fundamental innovation, the development of new processes and new products, and that for this a protected market may be useful and beneficent. The courts, however, have refused to be drawn into so speculative an inquiry. As Professor Schumpeter's colleague, Dean Mason, has put it, "Unless we want to climb with Schumpeter up and down the seamless web of history, we must become theorists and be prepared to generalise. . . . The difference between *per se* and the rule of reason is essentially a difference in the detail required of the model in order to permit an inference concerning effects." [18]

It is in the cases not presenting a question of practices that are *per se* violations, the cases especially of alleged monopolisation, that the task of the courts becomes almost incredibly complex. The physical dimensions of a great antitrust case are staggering.[19] The *Aluminium* case spawned a record of 58,000 pages of testimony and over 1,800 exhibits. The *Investment Bankers* case far outstripped this record in documentary evidence: over 10,000 exhibits were processed for authenticity and accuracy of tabulations in pre-trial proceedings. The *Shoe Machinery* case, which occupied six years on the trial calendar, produced 4,600 exhibits for the Government, many of which were multi-volume tabulations. The oral testimony was spread over some 12,000 pages. When the trial judge required the Government to submit a trial brief in order to focus the case, the Government obliged by filing as the brief a shelf of volumes of almost 7,000 pages, of which 634 pages were a summary and analysis of the facts, 87 pages the law, and over 6,000 pages in seventeen volumes devoted to excerpts from the documentary evidence.

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[17] *Appalachian Coals, Inc.* v. *U.S.*, 288 U.S. 344, 359–360 (1933).

[18] Mason, *Economic Concentration and the Monopoly Problem* (1957) 395.

[19] The figures are taken from McAllister, "The Big Case: Procedural Problems in Antitrust Litigation" (1950) 64 Harv.L.R. 27.

If these are the physical contours of major antitrust litigation, what are the intellectual demands on the judge? Aside from mastering the record, he is called on to give a meaning to the concept of monopoly that will not be thought naive by economic analysts. There has indeed been a marked shift away from what might be called the criminal-law view of attempted monopoly, which stressed the bad conduct of the firms, towards an economist's view, which is concerned with market power. Probably the path-breaking decision in this movement was Judge Hand's in the *Aluminium* case, a litigation which came to his court only because the Supreme Court, which had jurisdiction directly from the trial court, could not muster a quorum to hear it, and Congress authorised the case to be sent instead to the intermediate court of appeals as the first and final appellate tribunal.[20] Judge Hand ruled that the defendants were in violation of the law because of their market position and could exculpate themselves only by demonstrating that the position had been thrust upon them, that it was due solely to superior skill or products or to such publicly granted advantages as franchises or patent rights. The stress on market power implies that the court must first determine what is the relevant market; what products are interchangeable with defendants', how many firms are competing in the market, and what is the power of the defendants to suppress or exclude competition? In this analysis the defendants' conduct—their market performance—is relevant less for its own sake than as evidence of market power, supplementing the evidence of the structure of the market. The judge here surely leaves the sunny moralism of the law for the dismal swamp of economics. Indeed, some economists would go further and insist that the proper criterion of lawfulness is " workable " or " effective " competition, which focuses on market performance, and particularly on progress in research and development. But, to quote Dean Mason again, " There are as many definitions of ' effective ' or ' workable ' competition as there are effective or working economists." [21]

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[20] *U.S.* v. *Aluminium Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

How is a judge, to whom economic analysis may be as remote as Norman French, to cope with all this? At present each side brings on its expert witnesses, who are likely to be no more satisfactory than expert witnesses elsewhere in the law. Perhaps the judge might call an expert witness of his own, though I am not aware of this having been done in an antitrust case. A bold and fruitful measure was taken in the *Shoe Machinery* case by Judge Wyzanski, an outstanding Federal judge, who appointed as his personal clerk not a recent law graduate, as is the custom, but a member of the Harvard economics faculty. It was the clerk's function to analyse the evidence for the judge, to put it in the framework of economic theory, and generally to make the judge as sophisticated in economics as the usual law clerk makes him in the law. Out of this venture, as a by-product bonus, has come a penetrating book on the case, written by the economist, who makes it clear incidentally that his suggestions for a decree were departed from in significant respects by the judge.[22]

Surely the legal profession in America will have to face the question whether these antitrust cases ought to be taken away from the ordinary courts and vested elsewhere. It is not that the courts have done too poorly with this jurisdiction. As Dr. Johnson said of the dog walking on its hind legs, the wonder is not that they do it so badly as that they do it at all. One corollary of judicial enforcement is that the decrees are likely to reflect caution. Where the offences are relatively closely defined there is a reluctance to enter upon speculative economic analysis. As Mr. Justice Frankfurter has put it[23]:

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[21] *Op. cit.*, *supra*, note 18, at 381.

[22] Kaysen, *United States* v. *United Shoe Machinery Corporation: An Economic Analysis of an Anti-Trust Case* (1956).

> " The dual system of enforcement provided by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. . . . Our interpretation of the Act, therefore, should recognise that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance."

Even under the very general standards of the Sherman Act caution is likely to be shown in the framing of a decree. Judge Wyzanski was perfectly candid about this in the *United Shoe Machinery* opinion[24]:

> " Judges in prescribing remedies have known their own limitations. They do not, *ex officio*, have economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. . . . Hearings in court do not usually give the remote judge as sound a feeling for the realities of a situation as other procedures do. Judicial decrees must be fitted into the framework of what a busy, and none too expert, court can supervise. Above all, no matter with what authority he is invested, with what facts and opinion he is supplied, a trial judge is only one man, and should move with caution and humility."

Whatever the reasons, it is a fact in the more than sixty years of experience under the antitrust laws, courts in only twenty-four litigated cases have entered decrees embodying the ultimate sanction of divorcement, divestiture, or dissolution.[25] It hardly needs to be said that the United States will watch with special interest the course of the British antitrust policy, couched in the most general terms of public interest, as it comes to be given content and sanctions by tribunals of first instance set apart from the courts of law.

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[23] *Standard Oil Co.* v. *U.S.*, 337 U.S. 293, 310, n. 13 (1949).

[24] *U.S.* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295—(D.Mass., 1953), affirmed *per curiam* 347 U.S. 521 (1954).

Some concluding observations of a more general sort may be in order. This survey can hardly fail to suggest certain wider considerations which are engaging the attention of universities today.

The first of these relates to ways of thinking. Throughout even this superficial study of the role of the courts in the economy it has been evident that there is a constant tension between the desire for certainty and simplicity on the one hand and respect for the complexity, variety and disorder of human conduct on the other—the familiar conflict between rule and discretion. In the limited areas we have been surveying, the courts have been torn between the claims of general rules (businesses " affected with a public interest," taxes " on interstate commerce," restraints " unreasonable *per se* ") and the demand for closer, more empiric analysis of the facts. One can, I believe, learn a good deal about the pragmatic temper by studying the performance of the Supreme Court. One comes to see that the pragmatic outlook is not to be taken in the vulgar sense that the truth is what will work, but in the sense that the meaning of an idea is best determined by comparing the consequences of its affirmance and its rejection in given contexts. This is the case, surely, with such ideas as liberty of contract, burden on commerce, and restraint of trade. One sees, too, that this outlook does not by any means dispense with the necessity for norms or standards; but these are clarified and even shaped by constant testing against the consequences of judgments one way or the other.

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[25] *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955) 354.

The second wider consideration suggested by this study relates to the respective roles of the expert and of those who sit in judgment. This in turn has a double aspect: the focus with which the judge ought to view the work of the expert, and the problems of communication between them. It will be apparent that the Supreme Court has been intensely concerned with the question of focus and has evolved standards of judgment varying with its various responsibilities: a more distant, less exacting focus in reviewing under the due-process clause, a closer view under the lens of the commerce clause, and a still closer scrutiny when developing first-hand, so to speak, the elastic criteria of the Sherman Antitrust Act. Facing the problem of communication with the expert, the judiciary is obviously still taking tentative steps. It is clear, at any rate, that the lawyer and judge are bound up inescapably in this besetting contemporary puzzle, which has been dramatised by the flights of science. The sad story is told of a young married couple, both scientists, who were unable to talk with one another about their work because he was a physical chemist and she was a chemical physicist.

The study of law—if it is enlightened and self-aware—can contribute measurably to the central inquiries of higher education: how to think and how to judge. And, reciprocally, the liberal arts—economics, history and philosophy, to name them in alphabetical order—are an essential nourishment for the lawyer or judge who seeks to comprehend his responsibilities and properly discharge them. These are the reasons, are they not, why the law occupies an honourable and important place in the life of a great University.

PAUL A. FREUND.

ASTREINTES IN FRENCH LAW *

BECAUSE of its obvious practical utility, the procedure of *astreintes* has been given wide application in French practice. This procedure operates through a *judgment condemning a recalcitrant debtor or obligor who refuses to carry out his obligation to pay a fixed sum in respect of every day he continues in default.*[1]

Recognition of procedure by *astreintes* is by no means recent: there are examples of it in judgments of 1809 and 1811. It became common in the second half of the nineteenth century, and at the present time is very frequently used. In fact, since the administration or executive shows extreme reluctance to help by actual physical compulsion in the enforcement of certain judgments, this procedure constitutes one of the few means left to the judges to compel execution.

Astreinte is particularly useful when used to enforce obligations to do or not to do some particular act; however, it can also be used where the obligation is to give, and even, since 1956,[2] to enforce payment of monetary awards. It cannot be used unless there is still a possibility of total or partial execution of the obligation, for *astreinte* is a means of applying pressure to overcome the unwillingness of an obligor who refuses to carry out his obligation.

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* Contrast has often been made between the generality of the Scottish primary remedy of specific implement and the more limited resort to specific performance permitted in English law. There is probably, however, no wide difference between the practice of the two countries. Even in Scotland, an alternative conclusion or crave for damages is very frequently included in a summons. The sanction of civil imprisonment for failure to implement decrees *ad factum praestandum* has been restricted in scope both by legislation and by practice, and defenders may procrastinate in carrying out their obligations without undue concern as to the consequences, and in the hope that the pursuer will eventually take damages in lieu of performance. Those concerned with the administration of justice may question whether the courts should not be given stronger powers to induce or compel the dilatory or recalcitrant obligor to perform. In French law this situation has been met by introducing procedure by *astreinte*. Mlle. Catala in this article explains the purpose and scope of *astreintes* and also the conflict of judicial and juristic opinion which have arisen regarding this procedure. Her conclusion in favour of it is based on sound judgment. Herself a French lawyer, Mlle. Catala has also spent a year in the School of Comparative Law, Tulane University, Louisiana, where this paper was produced. She was assisted in translating it by Mr. Balfour Halévy.

T. B. S.

[1] 7 Planiol et Ripert, Traité Pratique de Droit Civil français, 97 (1954).

This pressure can be applied in several different ways[3] on the recalcitrant party. Most frequently the judge imposes a comminatory *astreinte*. At the time this is imposed the idea of damages does not enter into the matter at all; the order is arbitrary and provisional. The judge, when he pronounces it, is not concerned with the actual damage caused by the delay in performance. He is concerned rather with the powers of resistance and with the recalcitrance of the obligor, and thus fixes the *astreinte* at a sum sufficiently large to overcome this reluctance to comply. It does not matter that this sum appears exorbitant: the judge will eventually have to liquidate the *astreinte*, and at that stage it will always be open to him to modify it to some lesser amount. For example, if a vendor refuses without any reason to deliver an article he has sold, he may be forced to comply by an extremely high *astreinte*, which will be greatly reduced when he in fact fulfils his obligation.

For several years, however, the courts have become more daring and have imposed, in certain cases, final *non-comminatory, definitive astreintes*.[4] These are fixed once and for all by the judge at the time of awarding them. Regarding these, however, a distinction must be made. Sometimes the word "*astreinte*" is used erroneously by the courts to comprise cases where the judgment is truly only to pay damages for the actual daily loss caused by continuing default, or, at most, the total of the loss already accrued combined with the continuing daily loss to the pursuer.[5] In other cases, however, the order pronounced against the defender, though final, does not correspond to the loss suffered by the claimant or pursuer: the amount of "*astreinte*" is fixed at a higher sum than could be awarded merely as damages and so cannot be justified under this head. Since such orders are pronounced once and for all by the judge, they are harder to justify in theory than the comminatory *astreinte*, the amount of which is supposed to be modified when liquidated. It would thus appear that these so-called *astreintes* deform the real nature of *astreinte*, which is essentially a provisional threat. They cannot be accepted as sound in legal theory.

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[2] *Ville de Marseille* v. *d'Authier de Sisgau*, Cour de Cassation, Section Commerciale, April 17, 1956. Semaine Juridique (hereinafter J.C.P.) 1956, II, 9330 note Vellieux.; Revue Trimestrielle de Droit Civil (hereinafter R.T.) 1956, Vol. 54, p. 539, No. 48.

[3] Fréjaville, L'astreinte. Dalloz Jurisprudence (hereinafter D.) 1949, Chron. I.

[4] *Fanet* v. *Cruchon*, Tribunal civil de Pont-l'Evêque, December 10, 1942. (1943) D.C. 119. *Laurent* v. *Le Meur*, Tribunal Quimper, March 5, 1946, (1946) J.C.P. II, 3079. *Société Cahen-Brisac* v. *Comité Central des groupements interprofessionnels laitiers*, Tribunal civil de la Seine, November 7, 1947. (1948) D. 135. *Fabre* v. *Veuve Goubern*, Montpellier, February 5, 1948. (1948) Recueil Sirey de Doctrine et de Jurisprudence (hereinafter S.), II, 108. *Société Louvroil, Montbard, Aulnoye* v. *Monnier*, Référés Avesnes, January 29, 1948, and: *Pruvet* v. *Sima*, Référés Vouziers, March 16, 1948. (1948) J.C.P. II, 4223.

Consequently, it is very important to determine precisely the scope of *astreinte* as an instrument of judicial pressure. Ought the *astreinte* imposed once for all (*astreinte définitive*) to be admitted? Must the comminatory *astreinte* be reduced at the time of liquidation to a strict equivalent of the damage caused; or, in order to conserve its penal character, should it be allowed to continue as an arbitrary amount and thus to give to the creditor an extra benefit? In other words, what are to be the rules of "liquidation"?

On the answer to this question depend the nature and effects of *astreinte*. It is at present very difficult to give a definite answer. For a long time the comminatory *astreinte* had been used daily by the courts, and, though its precise character remained uncertain, it appeared to be finally established. However, in recent years, this uncertainty has provoked great controversies in the courts as well as between authors, concerning non-comminatory as well as comminatory *astreintes*.

For some, *astreinte* has ultimately a strictly compensatory function and thus merges with damages for delay in performance. (These damages are entirely distinct from compensatory damages, which are only awarded if there is, in the end, no execution of the obligation.) This is particularly the opinion of Mr. Paul Esmein, who wrote: " The sum actually collected by the obligee must be measured by the damage he has suffered and is solely to recompense him. The idea of reparation, which must govern the final liquidation after decree of *astreinte*, leaves no room for the idea of private penalty." [6]

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[5] Fréjaville, *op. cit.*; Paris, July 13, 1949. (1950) S. II, 47.

For others,[7] on the contrary, the idea of *private* penalty prevails over that of mere damages. *Astreinte* for them is a penalty which punishes the refusal of the debtor to perform the obligation. The *astreinte* must be in proportion to this refusal, and not assessed by reference to the damage caused by it. It can be argued that it helps in maintaining *ordre public* by avoiding a situation where judicial decisions would remain unenforced. The legislators have sometimes created penalties for non-performance of certain obligations.[8] The courts, for their part, have also, it is said, organised an efficient sanction designed to ensure the execution of the judgments which the administration is often chary of enforcing. *Astreinte* thus performs the function of a civil *poena* or penalty.

The full practical importance of the difference of view is obvious. If the law is that *astreinte*, whether comminatory or not, must be regarded as merely equivalent to damages, then the judge can never fix it definitively at an amount greater than damage caused or to be caused. The party in default, therefore, can estimate in advance the amount he will have to pay, and thus *astreinte* must lose all its coercive force. On the other hand, *astreinte* will retain this force to the full if, refusing to limit it to the damage suffered, the court fixes it in proportion to the recalcitrance to perform of the obligor. The cases provide varying solutions at the moment. In 1953, the " 2ème Section Civile " of the Cour de Cassation clearly stated that *astreinte* should be assimilated to the idea of damages, but its decision encountered lively opposition from inferior jurisdictions and even from other divisions of the Cour de Cassation. This opposition has already provoked a partial reversal of opinion by the "2ème Section Civile," with regard to non-comminatory *astreinte*. The divergences are not yet resolved. We will discuss first the conflict in the case law; then in the second place will be considered the solutions suggested by the *doctrine*.

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[6] Paul Esmein, in Planiol et Ripert, *op. cit.*, p. 110, No. 793.

[7] III Henri et Léon Mazeaud, Traité de la Responsabilité Civile, No. 2497 and following (1948).

[8] *e.g.*, failure to carry out an order of custody for a child (loi du 6 Décembre 1901), the failure to support a family (loi du 7 Février 1924), etc. *Cf.* contempt of court in English law with regard to failure to carry out judgments. Esmein, *op. cit.*, p. 109, No. 793–G. Ripert, La règle morale dans les obligations civiles, No. 185.

Conflict in the Case Law

A. *Judgment of February 27, 1953: assimilation of astreinte with damages*

On February 27, 1953, a judgment of the Court of Appeal of Rennes (June 8, 1948) was brought before the Cour de Cassation.[9] The Court of Appeal had ordered the occupant of certain commercial premises—to which he did not have good title—to vacate within forty-eight hours, with an *astreinte* of 5,000 francs per day. The court followed the practice of giving definitive *astreintes*, without relation to damage likely to be caused, a practice which seemed well established at that time.[10] However, the Cour de Cassation expressly disapproved of this, arguing that "in thus liquidating *astreinte* . . . without being able to ascertain that the sum (of *astreinte*), added to the damages which may eventually be awarded, would not exceed . . . compensation for the damage caused to the obligee by the delay of the obligor in performing, the Court of Appeal had not shown a legal basis for its decision." In the same decision, the Cour de Cassation prohibited in general terms all non-comminatory *astreintes*, and laid down that a judge, in liquidating a comminatory *astreinte*, should fix the amount at the actual damage caused by the delay.

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[9] *Renaud* v. *Fraval*, Cour de Cassation, Chambre Civile, 2ème Section Civile, February 27, 1953. (1953) S.I. 196. (1954–1955) R.T., Vol. 52–53, p. 107, No. 43.

[10] See decisions cited in footnote 4.

The import of this decision is considerable: not only does it forbid the practice of ordering non-comminatory *astreintes*, but it also transforms the nature of comminatory *astreintes*, which are to be reduced to the mere amount of damages necessarily corresponding to the loss caused to the obligee by the delay. On this view the *astreinte* must lose all interest, since the severity of the judgment which threatens the obligor is unconnected with his good or bad faith and is related solely to damage caused. It can only prove coercive to parties unaware of the case law, who may still expect that they are bound to satisfy a judgment for a greater amount than the damage flowing from their refusal to perform.[11]

B. *The resistance of some courts to the Cour de Cassation*

It could have been foreseen that this attitude of the Cour de Cassation would not be received with favour by the other courts. *Astreinte* is so useful as to be practically irreplaceable, and its usefulness increases with the more and more general refusal on the part of the administration to execute by force the judgments of the courts. The inferior courts declined to see such an effective coercive procedure taken from them. Among the divisions of the Cour de Cassation itself grave differences also appeared. On October 14, 1953,[12] the " Section commerciale de la Chambre Civile " condemned the practice of awarding non-comminatory *astreintes*, but instead of repeating the general prohibition given by the " 2ème Section civile de la Chambre Civile " on the previous February 27, it invoked the law of July 26, 1949, which prohibits such *astreintes* in case of expulsions of tenants. On April 5, 1954, the " Section sociale de la Chambre Civile " took the same attitude, condemning definitive *astreintes* as being contrary to the 1949 law, without referring to the 1953 judgment.[13]

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[11] H. et L. Mazeaud (1954–1955) R.T., Vols. 52–53, p. 108, No. 43.

[12] *Carrier* v. *consorts Cormier*, Cour de Cassation, Chambre Civile, Section Commerciale, October 14, 1953. (1953) D.J. 695; (1953) Gazette du Palais (hereinafter G.P.) II, 331. (1954–1955) R.T. *op. cit.*, p. 108, No. 43.

At the same time an even clearer opposition was manifested in the lower courts. Adopting the terms of its earlier judgment of March 2, 1954,[14] the Court of Agen, on June 29 of the same year, affirmed the essential difference in nature of damages for delay in execution on the one hand and *astreinte* on the other. The court stressed that the latter was not intended " for the express purpose of compensating the harm which a delay in execution can cause to the other party," but constituted a means of coercing the obligor, " a coercive procedure." The amount of the liquidated *astreinte* in the view of the court was not to be measured by the loss caused by the delay, but by the seriousness of the bad faith of the obligor. Thus is brought to light the latent conflict between the two possible conceptions of *astreinte*: one which tends to identify it, purely and simply, with damages for delay, the other which wishes to make it an instrument of coercion at the disposal of the judge.

This divergence of opinion was aggravated by the uncompromising position taken by the Commercial Section, which, on April 17, 1956, defined comminatory *astreinte* as " a provisional order, entirely distinct from damages." In the eyes of this court *astreinte* is a means of compulsion which is to be calculated, not by considering the damage caused by delay, but by reference to the resistance of the obligor, which it is designed to overcome.[15] The Court of Riom followed the example of the Commercial Section, and on December 10, 1956,[16] refused to reduce the *astreinte* to the amount of damage actually caused to the obligee by the delay; this damage "represents only one of the elements to be considered"; it is "in the gravity of the fault" that *astreinte* "finds its normal yardstick."

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[13] *Deschaux* v. *Thépaut*, Cour de Cassation, Chambre Civile, Section Sociale, April 5, 1954. (1954) G.P. I, 395; (1954–1955) R.T., *op. cit.*, p. 497, No. 36.

[14] *Galis et autres* v. *Delmouly*, Cour d'Agen, March 2, 1954. (1954) G.P. I, 292; (1954–1955) R.T., *op. cit.*, p. 498, No. 36; Agen, June 29, 1954. (1954) G.P. II, 119; (1954–1955) R.T., *op. cit.*, p. 660, No. 37. See: Rabat, 6 Décembre 1955. (1956) G.P. Table analytique, p. 27; Gaz. Trib. Maroc, February 25, 1956.

[15] *Ville de Marseille* v. *d'Authier de Sisgau*, see footnote 2.

[16] *Pradon* v. *Société de Production d'énergie électrique de la Sioule*, Cour de Riom, December 10, 1956. (1957) S.J. 112; (1957) D.J. 101; (1957) J.C.P. II, 10118; (1957) R.T., Vol. 55, p. 349, No. 41.

C. *The attitude of the Cour de Cassation*

In the face of this opposition, the Cour de Cassation first maintained its original position. On March 10, 1955, the "Section Sociale" reaffirmed that a judge, in allowing damages for delay, must justify them on the ground that they correspond to the loss in fact resulting from delay in performance.[17] On October 27 of the same year the "2ème Section Civile" restated the principle in similar words.[18]

The resistance to the Cour de Cassation of the Courts of Appeal finally resulted in a very peculiar reaction on the part of the "2ème Section Civile." In two judgments given on January 31 and February 1, 1957,[19] it persisted in assimilating the ideas of *astreinte* and damages for delay, but, modifying its solution of 1953, it found in these combined ideas grounds for admitting the legality of non-comminatory *astreintes*. These should always be assimilated to damages compensating the loss caused or to be caused by the delay of the obligor in execution. It is in the power of the judge to evaluate the compensation he orders, and he can order for future harm, as well as for loss already suffered, if this harm can be accurately ascertained.

Thus under the guise of damages for future ascertainable loss, the same definitive *astreintes* were allowed as the court had condemned in 1953. They only remain prohibited in cases of eviction of tenants, due to the law of July 21, 1949.

The problem of non-comminatory *astreintes* thus appears to be solved by this reconciliation between the

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[17] *Veuve Demoge et Cie* v. *Viot*, Cour de Cassation, Chambre Civile, Section Sociale, March 10, 1955. (1956) D.Somm. 2; (1955) Bulletin Civil IV, p. 167, No. 225.

[18] Cour de Cassation, Chambre Civile, Section Civile, October 27, 1955. (1957) G.P. I, 179.

[19] Cour de Cassation, Chambre Civile, 2ème Section Civile, January 31, 1957. (1957) S.J. 92; (1957) R.T., Vol. 55, p. 539, No. 45; February 1, 1957. (1957) S.J. 93; (1957) R.T., *op. cit.*; (1957) G.P. I, 440.

"2ème Section Civile" and the other courts. Judicial differences still remain in cases concerning comminatory *astreintes*, some cases refusing to follow the position of the "2ème Section Civile." Many supporters of *astreinte* wish, unlikely though this may be, that the Cour de Cassation will modify its position. The final result of the differences will not be known before a judgment *en Assemblée Plénière*[20] (Whole Court).

Solutions suggested by the "Doctrine"

A. Assimilation of astreinte and damages for delay

The position adopted by the Cour de Cassation is in keeping with certain opinions of doctrinal writers. Many of these hold that, in reality, *astreinte* is nothing more than an indemnity which must correspond exactly to the loss. If the *astreinte* is definitive, it must only represent harm actually suffered or future loss which can be evaluated with certainty by the judges. If the *astreinte* is comminatory it can be fixed, in the first instance, at a figure greater than the loss suffered; but when the action has to be determined finally, the judge is bound to liquidate the *astreinte*, and, whether he keeps the original figure or reduces it, he must decide according to the normal rules of law for calculating damages. *Astreinte*, thus, ceases to be coercive and becomes merely the indemnification for loss suffered by delay in execution. For M. Paul Esmein, "This change (of the amount, at the time of liquidation) is not simply an alteration of the amount, it shows the replacement of the prior threat by an indemnity. Even if the amount is in no way altered, there is still a change in the purpose of the judgment."[21]

The inconvenience of this solution, which is the one of the " 2ème Section Civile," is obvious: if *astreinte* is purely comminatory and provisional, and must ultimately always become no more than an indemnity, it loses all its efficacy. The resistance of the obligor not being penalised in the last resort, the *astreinte* does not keep any more its coercive power.[22] Commenting on the judgment of February 27, 1953, MM. Henri et Léon Mazeaud wrote: " This is the death of *astreinte*, and of its efficacy . . . ," and, a little later, " If, in the ultimate liquidation, the *astreinte* is to be reduced to the amount of loss caused by the delay, and thus to be transformed into damages *simpliciter*, then it has no more use except to frighten badly advised parties . . ." [23]

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[20] The "Assemblée Plénière" is a body which includes the most representative elements of the Cour de Cassation. Its function is to maintain the unity of the law inside the court by giving a definitive solution to a problem which has provoked conflicting solutions in various sections of the court.

[21] P. Esmein, in Planiol et Ripert, *op. cit.*, No. 791, p. 106.

B. *Astreinte and private penalty*

Consequently, many authors, in order to keep the real *raison d'être* of *astreinte*, contend that it can be liquidated at a sum greater than the actual loss caused,[24] by erecting the *astreinte* into a real *poena*, into a civil penalty punishing the bad faith of the obligor. But here, too, objections abound. There can be no penalty without express provision of law; and, apart from exceptional cases,[25] the civil law does not authorise such a system of sanctions. Further, if the obligee is allowed to receive a higher sum than the strict reparation of the harm he suffered, he benefits from an unjust enrichment. It has been argued [26] that this enrichment finds its " cause " in the obligor's fault. But it does not seem to be a conclusive justification. Conceived as a private penalty, *astreinte* seems to lack legal justification.

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[22] H. et L. Mazeaud, *op. cit.*, No. 2500; P. Esmein (1941) G.P. I, Doctr. 81.

[23] H. et L. Mazeaud (1954–1955) R.T., Vols. 52–53, p. 108, No. 43; p. 660, No. 37.

[24] Mazeaud, *op. cit.*, Traité, Vol. 3, No. 2500–2503; Meurisse (1948) G.P. II, Doctr. 11; Laurent (1948) D. 145; note G.B., sous Pont-l'Evêque, December 10, 1942, *op. cit.*

[25] One is concerned here with so-called " legal *astreintes* "; in certain cases, statutes make failure to perform punishable by fine: loi du 18 Mars 1919 ordering those concerned in business operations to register with the Registre du Commerce; loi du 5 Décembre 1922 on municipal housing, etc.

[26] Pierre Mazeaud, sous Riom, December 10, 1956. (1957) J.C.P. II, 10118.

C. *Compromise suggested by M. Fréjaville*

Trying to reconcile the two opposing points of view, M. Fréjaville has suggested a compromise.[27] In his opinion *astreinte* should be assimilated to the idea of damages for delay, but, for all this, need not lose its coercive power. The uncertainty which surrounds the subject of *astreinte* results from a contradiction within the law regarding civil liability (*Responsabilité Civile*). The *Doctrine* of the leading writers teaches that this branch of law has a purely restitutive function, and that damages must be exactly equivalent to the harm suffered. In fact, however, the judges take into account the seriousness of the obligor's fault, his financial situation and his bad faith. In so introducing a subjective element of evaluation they give to civil liability a preventive and repressive character which is complementary of its restitutive function.[28] The wide limits within which the judges may fix their evaluation of the damages give its coercive effect to *astreinte.* (The Cour de Cassation, it may be stressed, controls the elements which may be considered by inferior courts in fixing damages but never the amount itself.) "*Astreinte,*" writes M. Fréjaville, "can be considered as a warning to the obligor that if he does not comply within the time specified in the decree, the damages for which he may be liable will be calculated severely according to a scale provisionally fixed at a certain sum for each day of delay."[29]

This compromise, which attempts to save *astreinte* while at the same time being in accordance with the position taken by the "2ème Section Civile" of the Cour de Cassation, is not conclusive of the problem. For the defender to fear the consequences of recalcitrance, the area of the judge's discretion must be sufficiently great to hold out a serious threat. However, this area is effectively limited as soon as the elements of the damages can be accurately estimated in terms of money. If, for example, the buyer in a contract of sale is forced, due to delay in delivery, to buy goods at higher than the contract price, in this case the damage, *i.e.*, the difference in price, can be easily ascertained. Thus M. Fréjaville's suggestion is no more than a limited solution.

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[27] Fréjaville, D. 1949, *op. cit.;* "La valeur pratique de l'astreinte" (1951) J.C.P. I, 910; Encyclopédie juridique Dalloz (1951) verbo Astreintes; Vizioz (1948) J.C.P. I, 689.

[28] Starck, Essai d'une théorie générale de la responsabilité civile, Thèse, Paris, 1947, p. 397.

[29] Fréjaville, D. 1949, *op. cit.*

Conclusion

In fact, the problem as to the effects of *astreinte* only appears insoluble because it is dominated by the problem of its legality. Most of the classical authors considered *astreinte* as an illegal procedure.[30] In order to justify it, it was argued that the judge has a power of *imperium*, derived from article 1036 of the Code de Procédure Civile, which gives him the right to make orders with regard to the parties.[31] This article seems, however, insufficient to support the contention, since it refers merely to normal control over the hearing of an action, and does not seem to give the judge power so wide as enable him to impose an *astreinte*.

Doubt about the legality of *astreinte* explains the position of the " 2ème Section Civile " which has been discussed. To keep *astreinte* within the limits of strict legality by assimilating it with damages for delay is to deprive the procedure of most of its efficacy. If, on the other hand, the judge is to fix *astreinte* at a higher amount than the actual harm suffered, the procedure—admittedly arbitrary—keeps its whole practical value, but remains on the borderline of legality. It is thus understandable that the 2ème Section Civile, anxious to maintain strict legality, adopted the former solution.

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[30] XXIV Demolombe, Cours de Code Napoléon, I Traité des Contrats, No. 494 (1881); VII Huc, Commentaire théorique et pratique du Code Civil, pp. 193–205, Nos. 136–145 (1894); IV Aubry et Rau, Cours de Droit Civil français, No. 299, p. 64, notes 12 ter et quater (1902).

[31] Adhémar Esmein, L'origine et la légalité de la jurisprudence en matière d'astreintes (1903) R.T., p. 5; *Vimont* v. *Cally*, Cour de Cassation, Chambre des Requêtes, November 22, 1841. (1842) D. I, 29; (1842) S. I, 170.

However, the alternative solution, it is submitted, is to be preferred. *Astreinte* is not completely an extra-legal procedure. The sum to which the party in default should finally be condemned can be divided into two elements: in a large measure, it must represent damages for delay; but, further, to those damages there might reasonably be added an additional sum, a *poena* or penalty which will penalise the recalcitrance of the party in default. The need in present circumstances for such a penalty arises from difficulties experienced in securing the implementation of certain judicial decisions, especially where these concern the expulsion of tenants. The failure of the administration has compelled the courts to take measures to secure the execution of their judgments. When this execution cannot be secured otherwise than by an *astreinte*, then, it is submitted, the judges must be allowed to use this procedure. *Astreinte* may be an institution on the edge of legality; but it results from the obvious inefficacy of legal procedures. Product of a firmly established tradition in the practice of the courts, *astreinte* is an instrument of pressure indispensable in present circumstances if the law is not to be flouted. It may be hoped that some day the legislators will confirm the validity of *astreinte* and thus solve most of the problems which it has raised. Intervention of the legislators, however, in the immediate future does not seem probable when one considers the problems which at present absorb their attention.

NICOLE CATALA.

THE MAXIM *NULLUM CRIMEN SINE LEGE* IN THE LAW OF WAR

(1) *Introductory*

It has long been a well-established principle of civilised jurisprudence that nobody should be punished for some act which was lawful when carried out.[1]

In his defence of Louis XVI at the bar of the National Convention on December 26, 1792, Citizen Desèze proclaimed in moving terms that, if there is no law to serve as a precept and no judge to pronounce the sentence, recourse should not be had to the general will. For the latter is by its very nature unable to speak about either a man or a fact.

As Willes J. observed in *Phillips* v. *Eyre*,[2] retrospective laws are, as a rule, of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. This precept of justice has since become enshrined in the legal codes of many countries.[3]

The Universal Declaration of Human Rights and the European Convention on Human Rights provide in identical terms that " no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." [4]

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[1] For a scholarly account of the origin and historical development of the doctrine see Hall in *Yale Law Journal*, 47 (1937), pp. 165–193. And see Glaser in *Journal of Comparative Legislation*, 24 (1942), p. 29; Elliott in (1956) *Juridical Review*, p. 22; and Glanville Williams, *Criminal Law* (1953), Chap. 12.

[2] (1870) L.R. 6 Q.B. 1. Nor must Lord Coke's famous dictum be forgotten—*Nova Constitutio futuris Formam imponere debet, non praeteritis* (2 Inst. 292).

[3] See the comprehensive survey by Woodhouse in *Grotius Society*, 41 (1955), pp. 69–72.

[4] Articles 11 (2) and 7 respectively. The Convention has been ratified by Great Britain subject to the reservation that punishment may be imposed for acts which are criminal according to general principles of law recognised by civilised nations.

In 1933 the criminal law and judicial machinery of Germany began to be transformed into a medium for the propagation of National Socialist ideology. Both the Ministry of Justice and the courts were equipped to enact and enforce statutes, decrees and orders of an essentially criminal nature, and to work in co-operation with German security police organisations so that by distortion and denial of judicial process a reign of terror might be created for suppressing all opposition to the political régime. The penal laws were extended in such inclusive and indefinite terms as to vest in the judges an almost unlimited and arbitrary discretion concerning not only the choice of law to be applied, but also the construction to be placed upon it. The definition of the legal nature of punishable offences became more vague, especially in statutes concerning " the sound sentiment of the people," " the undermining of the defensive strength of the nation," and through the development of the doctrine of crime by analogy.[5] The principle of *nullum crimen sine lege* was discarded by Article 2 of the " Law to Change the Penal Code " promulgated by the *Reich* Minister of Justice on June 28, 1935.[6] That Article provided: " Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of penal law and the sound concept of the people, shall be punished. If no specific law can be directly applied to this act, then it shall be punished according to the law whose underlying principle can most readily be applied to the act."[7] Furthermore, on August 20, 1942, Hitler issued the following decree: "A strong administration of justice is necessary for the fulfilment of the tasks of the Great German *Reich*. Therefore, I commission and empower the *Reich* Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the *Reich* Minister and Chief of the *Reich* Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law."

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[5] The Second International Congress for Comparative Jurisprudence formulated a resolution against the doctrine of analogy in criminal law and expressed itself in favour of the principle *nulla poena sine lege*: see *Voeux et Résolutions du Deuxième Congrès International de Droit Comparé*, The Hague, August 4–11, 1937.

[6] *Reichgesetzblatt* I, No. 839. A similar amendment of section 170 (a) of the Penal Code was made by the Law of June 28, 1935, which provided: " If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law." See also the Law of April 26, 1942 (*Reichgesetzblatt* I, No. 44). The Permanent Court of International Justice held that application of the Law of June 28, 1935, to Danzig violated the requirement that the government of the city should be conducted according to the rule of law (*Rechtsstaat*): Advisory Opinion of December 4, 1935, Series A/B–No. 65. And see the authoritative work of Ernst Huber, *Verfassungsrecht des Grossdeutschen Reiches* (1939).

Nor was Germany the only country boasting a highly developed legal system to reject the *ex post facto* doctrine. Thus, Article 2 of the Russian Penal Code of 1926 rendered criminally liable "all citizens of the R.S.F.S.R. who have committed socially dangerous acts within the R.S.F.S.R. as well as outside of the R.S.F.S.R." And Article 13 of the Italian penal project of 1921 followed this line by declaring criminal "acts which are committed solely for political motives or in a collective interest."[8]

(2) *The Maxim in International Law*

In their reservations to the Report of the Commission on the Responsibility of the Authors of the War, 1919,[9] the United States representatives expressed the opinion "that an act could not be a crime in the legal sense of the word unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted."[10] The case of *United States* v. *Hudson*[11] was cited, in which the Supreme Court held that "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence." The reservation continued: "What is true of the American States must be true of this looser union which we call the Society of Nations. The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence. They felt, however, that the difficulty . . . was not insurmountable, inasmuch as the various States have declared certain acts violating the laws and customs of war to be crimes, affixing punishments to their commission, and providing military courts or commissions within the respective States possessing jurisdiction over such offences." [12]

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[7] This Article remained in force until repealed by Allied Control Council Law No. 11.

[8] Schick, *The Development of the Idea of an International Criminal Jurisdiction* (1944), p. 232.

[9] Text in *American Journal of International Law*, 14 (1920), p. 95.

[10] *Ibid.* p. 145.

[11] (1812) 7 Cranch. 32.

Several modern writers have also expressed the view that "international law knows of no crimes. It forbids certain acts. But it provides no punishment for them. It follows that no international court can punish any accused person in accordance with the rules of international law except by a flagrant violation of the rule of *nulla poena sine lege*." [13]

But it has been pointed out that, although the United States Constitution expressly forbids to both nation and the states the enactment of *ex post facto* laws within the meaning of the interpretation given by the Supreme Court,[14] the Constitution does not interdict retroactive legislation in civil matters and retroactive criminal legislation which is not detrimental to an accused person. Moreover, the norms incorporated in the Constitution are not necessarily expressive of a general principle of law recognised by all civilised nations.[15]

The question of penal sanctions appears to have become pressing after the First World War, mainly due to changing methods of warfare which involved greater cruelty. The absence from the Hague Conventions of 1907 of express provisions relating to individual criminal liability for violations thereof led some writers to conclude that failure to observe the prohibitions contained in the Conventions gave rise only to a civil claim against the belligerent State concerned for damages or compensation.[16] It was also contended that penal sanctions were merely proposed and hinted at in Articles 29 and 30 of the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field.[17] It was generally realised, however, that civil remedies would not act as a sufficient deterrent in respect of violations of the rules of warfare and that it would be monstrous if the absence of express provisions in the conventions implied a complete lack of penal sanctions, especially as most of the offences committed in the war constituted reprehensible crimes according to the municipal law of the belligerents. The municipal law of most civilised States provided penal sanctions for infractions of the laws of war, and the punishment by military tribunals of crimes attributed to members of the enemy armed forces was envisaged by the military law of the United States, France and Germany, in particular.[18]

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[12] *Loc. cit.*, p. 146.

[13] Cohn in *Grotius Society*, 26 (1941), p. 143. *Cf.* Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943), pp. 78–79, and Glueck, *War Criminals, their Prosecution and Punishment* (1944), p. 106, who says: "It is submitted that such a view reflects a slavishly superficial conception of the doctrine. The formula *nullum crimen sine lege* summarises a protest against penal legislation with retroactive effect."

[14] *Calder* v. *Bull*, 3 Dall. 386 (1798).

[15] Schick in *University of Toronto Law Journal*, 7 (1947–8), p. 56.

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[16] See Donnedieu de Varbres, *Le Procès de Nuremberg* (1947), pp. 13–14. The writer quotes in support of his view Louis Renault, who played an important part in the drawing up of the Convention and who, in his article " De l'application du Droit pénal aux faits de guerre " (*Journal du Droit International Privé* (1915), p. 326), insisted that penal sanctions had never been contemplated. Art. 3 of Hague Convention No. IV of 1907 provides that a belligerent who violates the provisions of the Regulations shall, if the case demands, be liable to pay compensation, and shall be responsible for all acts committed by persons forming part of its armed forces.

[17] D. de Varbres, *op. cit.*, p. 14. Article 29 provides: " The Governments of the High Contracting parties shall also propose to their legislatures, should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention. . . ." Article 30 provides: " On the request of a belligerent an inquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible."

[18] See, for example, Arts. 47 and 71 of the Lieber Code, 1863; the German *Kriegsbrauch im Landkriege*, 1902; and Art. 249 of the French Military Penal Code of 1913 (*Journal de Droit International Privé* (1913), p. 1505).

In the international sphere the matter was brought into prominence as a result of the report submitted in March 1919 by the Commission on the Responsibility of the Authors of the War to the Preliminary Peace Conference, and by Article 228 of the Treaty of Versailles, whereby the German Government recognised the right of the Allied and Associated Powers to bring before military tribunals persons accused of offences against the laws and customs of war.

Prior to the First World War, however, no real attempt had been made by States to differentiate between those violations of the laws of war which were to be considered criminal and those infractions which, on account of their less serious nature, were more analogous to summary criminal offences, or to civil wrongs in municipal law giving rise merely to an action for damages. The first step towards distinguishing war crimes from non-criminal breaches of the law of war seems to have been taken by the 1919 Commission on Responsibilities which in its report declared that the war had been " carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity." The Commission then went on to compile a list of serious crimes which it considered should be made the subject of individual responsibility and punishment.

The Geneva Convention of 1929 for the Amelioration of the Condition of Wounded and Sick of Armies in the Field expressly stipulated that the contracting States should take all necessary steps to instruct their troops in the provisions of the Convention and to bring them to the notice of the civil population, and that the Governments should propose to their legislatures, should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the Convention. Even so, the Convention made no express provision for the punishment of individual offenders, nor was any distinction drawn between acts which were to constitute war crimes and those which were not.

The Second World War saw the firm establishment of the concept of individual criminal responsibility for violations of the laws of war. In addition it was recognised that not every breach or non-observance of the Hague and Geneva Conventions could be regarded as a war crime. In 1944 a leading authority suggested that war crimes proper might be defined as " such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity."[19] This guiding principle formed the basis of the Charters of the Nuremberg and Tokyo International Tribunals and of Law No. 10 of the Allied Control Council for the occupied zones of Germany, in so far as those documents enumerated certain atrocities and offences against persons and property which were to be recognised as war crimes and in respect of which there was to be individual liability. The definition of war crimes in all three documents was substantially identical.

Although it is often difficult to attain a just reconciliation between the imposing demands of military discipline and the necessity of preserving the supremacy of law, it must be emphasised that by entering into the armed forces an individual cannot divest himself of all legal responsibility for his acts.

The cause of justice would likewise be defeated if the plea were accepted that at the time of the offence no adequate machinery for enforcing the law had yet been devised.[20]

In the *German High Command Trial* the Tribunal said: " True no court had been set up for the trial of violations of international law. A State having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the State has the right to set up a tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws." [21]

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[19] Lauterpacht in *British Year Book of International Law*, 21 (1944), p. 79.

[20] Hyde, *International Law* (2nd ed., 1945), vol. iii, p. 2412.

The main objection to retrospective legislation is that at the time of performing the act in question the person concerned was justified in believing that he was acting in accordance with the law. No such belief can reasonably be said to exist in case of murder and other heinous crimes. No grave injustice would be done to a person accused of war crimes in respect of acts universally known to be prohibited by fundamental principles of criminal jurisprudence.

Thus, in an appeal against the decision of a court in the British zone of occupied Germany sentencing the appellant to imprisonment for membership of the S.S., it was contended, in part, that Control Council Law No. 10, which made such membership criminal, was retroactive and offended against the principle *nullum crimen sine lege*. In rejecting the appeal the court observed that this principle "is laid down in Article 116 of the Weimar Constitution and in Article IV, paragraph 7, of British Military Government Law No. 1. But it is not an unalterable maxim of natural law. Even before the establishment of the national-socialist régime in Germany, a law amending the Constitution could, according to the Weimar Constitution, in certain exceptional cases derogate from that principle." [22]

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[21] United States Military Tribunal, Nuremberg: *War Crimes Reports*, 12 (1949), pp. 62–63. These Reports have been selected and prepared by the United Nations War Crimes Commission and appear in fifteen volumes (1946–49) published by H.M. Stationery Office.

[22] *In re S., Oberster Spruchgerichtshof*, September 23, 1947: *Annual Digest of Public International Law Cases*, 1947, Case No. 111. In *Re Klinge*, *War Crimes Reports*, 33 (1948), p. 1, the Norwegian Supreme Court held that Arts. 96 and 97 of the Constitution did not preclude the retrospective application of the Provisional Decree of May 4, 1945, in so far as it provided for the imposition of a more severe penalty, namely capital punishment, in respect of criminal offences under

In *Phillips* v. *Eyre*, described by Lord Wright as of great authority, it was said: " In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally and necessarily unjust. There may be occasions and circumstances involving the safety of the State or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society, for want of prevision, fail to meet, and in which the inconvenience and wrong *summam jus summa injuria*." In other words, " no such inflexible course has ever been followed in English law because it has been recognised that on occasion *ex post facto* legislation, although in principle undesirable, may nevertheless be necessary."[23]

In the context of war crimes trials much ingenuity was displayed by writers in an endeavour to find convincing grounds for some relaxation in the strict application of the principle.

Thus, for example, it was contended that a State such as Germany, by acting in blatant defiance of international law, must forfeit all claim to its protection; and that the calculated planning of widespread aggression and indiscriminate violation of rules of warfare thereby setting at nought the dictates of humanity render the State responsible an outlaw in the eyes of the civilised world and, as such, liable to receive condign and peremptory treatment.[24]

Another argument put forward was that if the Treaty for the Renunciation of War, 1928, or general principles of international obligation sufficed to justify a declaration of war against Germany undertaken in defence of Poland, so must the trial and punishment of those responsible for initiating such aggression likewise be authorised. " To be sure, we would demand a more explicit authorisation for

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Arts. 228 and 229 of the Penal Code. The view seems to have been adopted that the extraordinary circumstance of war crimes trials, doubtless never envisaged by those responsible for framing the Constitution, justified the departure from a strict interpretation of those Articles.

[23] Goodhart in (1946) 58 *Juridical Review*, p. 17.

[24] Schwarzenberger in *Tulane Law Review* (1947), p. 351.

punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity that we can afford to carry to that extreme. International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here? "[25]

The point is also made that during an early stage in the development of many legal systems—a situation in which international law still finds itself—the rules of law, not having been embodied in any formal code, still derive their authority from unwritten custom. In those circumstances it is not unlikely that courts will expose themselves to the charge of legislating *ex post facto* under the guise of judicial revelation.[26] Despite this reservation, however, not everybody would concur with the Judge Advocate who, in the *Peleus Trial*, said to the court: " My advice to you is that the maxim (*nullum crimen sine lege*), and the principle that it expresses, has nothing whatever to do with this case. It has reference only to the municipal or domestic law of a particular State, and you need not be embarrassed by it in your consideration of the problems that you have to deal with here."[27] Nor can the more restrained sentiments of the United States tribunal in the *Justice Trial* be allowed to pass altogether unchallenged: " The *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, although the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional States, could be applied to a treaty, a custom or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth." [28]

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[25] Wechsler, in *Political Science Quarterly*, 62 (1947), pp. 23–25.

[26] Brierly, *The Outlook for International Law* (1944), p. 6; Glueck, *The Nuremberg Trial and Aggressive War* (1946), pp. 38–45. And see Schick in (1947) 59 *Juridical Review*, p. 206.

[27] British Military Court, Hamburg: *War Crimes Reports*, 1 (1947), p. 12. Likewise Kelsen, who asserts that " the rule against retroactive legislation is not valid at all within international law, and is valid within national law only with important exceptions ": (1947) 1 *International Law Quarterly* at p. 164.

In the opinion of Kelsen " a retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed seems also to be an exception to the rule against *ex post facto* laws," and if the act when performed is morally, but not legally, wrong, the law attaching a sanction *ex post facto* does not offend any moral idea upon which the doctrine is based. This, in particular, is true of an international treaty under which individuals, in their capacity as organs of the State, are held responsible for violations of international law.[29] That argument becomes even more persuasive in the light of the solemn warnings of impending retribution repeatedly issued to Germany by the Allies while hostilities were in progress. In the words of a distinguished statesman: " It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, which led them to commit their crimes. That we have finally recognised our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear." [30] And to quote again from the judgment in the *Justice Trial*: " As a principle of justice and fair play, the rule (*nullum crimen sine lege*) will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by Control Council Law No. 10 can assert that he did not know that he would be brought to account for his acts."[31]

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[28] *United States Military Tribunal*, Nuremberg: *War Crimes Reports*, 6 (1948), p. 41. Scelle considers that the doctrine is only to be found in advanced systems of law whose principal task is to assure individual liberty and protection. He is surprised that the Nuremberg International Tribunal did not base the legality of its Charter and Judgment on Article 38 of the Statute of the International Court of Justice concerning " the general principles of law recognised by civilised nations ": *Droit International Public* (1948), pp. 973–975.

[29] Kelsen, *Peace through Law* (1944), p. 87.

[30] Henry L. Stimson in *Foreign Affairs*, 25 (1947), pp. 179–189.

(3) *The Treatment of the Plea by War Crimes Tribunals*

Acting through their respective zone commanders, the four occupying powers in Germany promulgated on December 20, 1945, Control Council Law No. 10 for the purpose, as stated in the Preamble, of giving effect "to the terms of the Moscow Declaration of October 30, 1943, and the London Agreement of August 8, 1945, and the Charter issued pursuant thereto in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal. . . ."[32] Both the Moscow Declaration and the London Agreement were made integral parts of Control Council Law No. 10. Each occupying authority was authorised to arrest persons within its zone of occupation who were suspected of having committed a crime, to take control of real and personal property belonging to such persons and to try them by any tribunal and according to any rules and procedure designated for the purpose by the zone commander.[33]

In pursuance of this power the Military Governor of the United States zone promulgated on October 18, 1946, Military Government Ordinance No. 7, which, in Article 1, provided for the establishment of military tribunals empowered to try and punish persons " charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes." It is interesting to note that when established such tribunals did not, on the whole, seem content to found their jurisdiction solely on Law No. 10, but adopted the view that Article II was declaratory of existing international law.

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[31] *War Crimes Reports*, 6 (1948), pp. 43–44.

[32] *Official Gazette of the Control Council for Germany*, No. 3, January 31, 1946.

[33] Control Council Law No. 10, Article III (1) (2). The acts to be treated as criminal, under the categories of *Crimes against Peace*, *War Crimes*, *Crimes against Humanity*, and membership of certain groups or organisations, appear in Article II of Law No. 10. For a comprehensive account of the formation and activities of the United Nations War Crimes Commission, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948.

" The Tribunal is giving no *ex post facto* application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncodified. Codification is not essential to the validity of law in our Anglo-American system. No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed." [34]

The Tribunal continued: " The law existing when the defendants acted is controlling. To the extent that Law No. 10 declares or codifies that law, and no further, is this Tribunal willing to go." [35]

In the *Einsatzgruppen Trial* the Tribunal said: " It is indeed fundamental in every system of civilised jurisprudence that no one may be punished for an act which was not prohibited at the time of its commission. But it must be understood that the *lex* referred to is not restricted to statutory law. Law does, in fact, come into being as the result of formal written enactment, and thus we have codes, treaties, conventions and the like, but it may also develop effectively through custom and usage and through the application of the Common Law. The latter methods are no less binding than the former." [36]

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[34] U.S. Military Tribunal, Nuremberg: *Re Flick and Ors.*, *War Crimes Reports*, 9 (1949), p. 17.

[35] *Ibid.* p. 26.

[36] U.S. Military Tribunal, Nuremberg: *Transcript*, p. 6711. And see Quincy Wright in *American Journal of International Law*, 41 (1947), p. 58.

The court pointed out that although some fields of international law—including the law of land warfare and of belligerent occupation—had to a substantial degree been codified, all nations considered themselves bound by rules of warfare which had come into being through common recognition and acknowledgment. In particular, the universal condemnation of the wanton killing of non-combatants was cited. In the present case most of the accused were charged with murder, and nobody could claim with any pretence of reason that there is any taint of retroactivity in the law of murder.[37]

In the *Hostages Trial* the Tribunal said: " Customary international law is not static. It must be sufficiently elastic to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that by conceding the existence of customary international law one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with a crime for committing an act which was not a crime at the time of its commission is such a right. . . . An international crime is such an act universally recognised as criminal which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances. . . . The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen. . . . Some war crimes, such as spying, are not common law crimes and being pure war crimes are punishable as such only during the war, and only if the offender is captured before rejoining his army. But some war crimes, such as mass murder, are punishable during and after the war. Such crimes are punishable by the country in which the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. It cannot be doubted that the Occupying Powers have the right to set up special courts to try those charged with the commission of war crimes as they are defined by international law." [38]

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[37] *Transcript*, pp. 6711–6712.

At the trial of General Rauter in 1948 for crimes against the civilian population in occupied Dutch territory, the defence submitted that when the acts were performed no rule of international law existed for the trial and punishment by a foreign State of persons violating the laws and usages of war; that in Holland the acts charged were made punishable for the first time by Article 27 (A) of the Extraordinary Penal Law Decree of December 22, 1943, which Article came into force on July 10, 1947, after they had been committed; and therefore the accused was being tried under retroactive legislation transgressing a general principle of penal jurisprudence expressly recognised in Article 1 of the Penal Code.[39] But the Netherlands Court of Appeal held that each deliberate transgression of the Hague Regulations constituted an international offence which had long been recognised as a war crime.[40] The court pointed out that although his actions were criminal the contention of the accused was that he could not be punished because no precise legal sanction had formerly existed in respect of them. However, although a guarantee of legal security and individual freedom was to be sought in the principle that no act is punishable save by virtue of an antecedent penal regulation, such principle is not absolute in the sense that it will afford immunity from the operation of other principles equally concerned with the furtherance of justice. The interests of the latter could not, for example, allow to go unpunished serious violations of generally accepted principles of international law, the criminal nature of which had already been established beyond doubt when they were committed, solely on the ground that a previous threat of retribution was lacking.[41]

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[38] Citing *Ex p. Quirin* (1942), 317 U.S. 1; *Re Yamashita* (1946), 327 U.S. 7: *War Crimes Reports*, 8 (1949), pp. 54–55.

[39] *Ibid.*, 14 (1949), p. 106.

[40] *Ibid.*, p. 119.

It should be kept in mind that continental tribunals often found themselves faced with an additional problem created by the practice of the relevant municipal statutory law in attaching to each offence a specific penalty. Thus in *Re Rauter* the suspension of Article 1 of the Dutch Penal Code in respect of war crimes by an Extraordinary Penal Law Decree, while resulting in the punishment of an act which was not criminal at the time of commission, did in fact reveal the technical inadequacy of the written law in countries such as Holland where criminal matters are solely or in the main governed by statute. Its effect was merely to facilitate the trial and punishment of war criminals when either or both might have been barred for want of precise and systematic penal texts. Article 27 (A) conferred upon Dutch courts jurisdiction to apply the rules of warfare to war crimes and crimes against humanity, subject to the condition that punishment was to be imposed in accordance with existing provisions of the Netherlands Penal Code.[42]

The significance of Article 27 (A) was evident in the trial of the German war criminal, Ahlbrecht, in 1946, by a Special Court at Arnhem. The accused, who was charged as a war criminal, was found guilty of manslaughter under Article 287 of the Dutch Penal Code and sentenced to death. On appeal to the Special Court of Cassation his conviction was quashed on the ground that the existing municipal law furnished no legal basis for the trial of war criminals. The Court of Appeal held that the decision taken by the lower court proceeded " from the mistaken train of thought that international law gave the Netherlands jurisdiction over all members of the enemy forces and officials who committed acts in this country which could be construed as offences described and made punishable in the Netherlands Penal Code"; that it would be "unreasonable to try foreign soldiers and officials according to Netherlands rules which were not written for them, instead of trying them by those rules of warfare to which they were already subject"; that although it could no longer be said, from the point of view of international law, that the State itself lacked competence over enemy war criminals, so far as the Netherlands law was concerned the court of first instance did not possess such jurisdiction. A number of serious violations of the laws of war had in consequence gone unpunished. It was this reversal which led to the passage on July 10, 1947, by the Dutch Parliament of the law introducing Article 27 (A) into the Extraordinary Penal Law Decree of December 22, 1943.[43]

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[41] *Ibid.*, p. 120. But compare Article 96 of the Norwegian Constitution which was interpreted so as to prohibit the arbitrary application of a general principle of international law. Before a rule of substantive international law can be applied by Norwegian courts it must be incorporated into the municipal law by a special Act. A clear example is to be found in Article 92 of the Norwegian military criminal code which fixes the punishment for a particular war crime committed by enemy soldiers. However, a Norwegian court was not precluded from sentencing to death a war criminal although the exaction of the supreme penalty was not authorised by municipal enactment until after the offence had been committed: *Re Klinge*, *War Crimes Reports*, 3 (1948), p. 1.

[42] *Ibid.*, 11 (1949), p. 92.

But it was the precedent created by the Nuremberg International Military Tribunal which courts—especially the United States tribunals—were in the main quick to cite as authoritative in the matter of retroactive legislation.

In its judgment of October 1, 1946, the Tribunal said: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but, in the view of the Tribunal, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."[44]

The judgment emphasises that the constitution and jurisdiction of the court were defined in the Charter annexed to the Agreement of August 8, 1945,[45] and that in entering into it the countries to which the German Reich unconditionally surrendered were exercising an undoubted right of sovereign legislation in occupied territory.

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[43] Article 27 (A) made punishable "war crimes or crimes against humanity" as defined in Article 6 (b) and (c) of the Charter of the Nuremberg International Military Tribunal.

[44] Judgment (H.M.S.O., Cmd. 6964), p. 38.

[45] Treaty Series No. 27 (1946), Cmd. 6903.

While the provisions of the Charter relating to war crimes did not give rise to widespread controversy, the same cannot be said of crimes against peace which comprised the planning, preparation, initiation and waging of wars of aggression. In the matter of war crimes the Tribunal pointed out that " by 1939 the rules laid down in Hague Convention IV of 1907 were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war referred to in Article 6 (b) of the Charter."[46] Furthermore, seeing that the Charter expressly made criminal a war of aggression it was unnecessary for the court to investigate its antecedents, but in view of the importance of the questions of law involved, full argument was heard.

The defence urged that *nullum crimen sine lege* is a fundamental principle of all law, that no State had made aggressive war a crime when the acts in question were committed, that no statute or treaty defined the alleged offence or attached any penalty for its commission, and that no court had been set up to try and punish delinquents.

In reply the Tribunal said: " The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."[47]

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[46] Judgment, p. 65.

The Tokyo International Military Tribunal declared itself to be in complete accord with the foregoing passage, saying: "In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinion."[48]

(4) *Conclusion*

In December 1946 the General Assembly of the United Nations adopted without dissent a resolution[49] affirming the principles of international law recognised by the Charter and Judgment of the Nuremberg Tribunal.

By a subsequent resolution[50] the General Assembly decided to entrust the formulation of those principles to the International Law Commission, and directed it "to prepare a draft code of offences against the peace and security of mankind." The final text of a draft code was accordingly presented to the General Assembly in the 1954 Report of the Commission.

Of particular interest in the present connection is Article 5, which provides that "the penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence." The commentary on that Article explains that such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to prescribe a definite penalty for each offence, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

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[47] *Ibid.*, p. 39. Cited with approval in 1948 by the Superior Tribunal of the Military Government of the French Zone of Occupation in Germany: *Re Hermann Roechling and Others*, reported in *Annual Digest of International Law Cases*, 1948, Case No. 120. It is interesting to note that the tribunal was composed of seven judges, five of whom were French, one was Belgian, the other being Dutch.

[48] Judgment of November 12, 1948: *Re Hirota and Ors.*, see *Annual Digest of International Law Cases*, 1948, Case No. 118.

[49] Resolution 95 (1), General Assembly Journal, No. 75: Supplement A-64, Add. I., p. 945.

[50] Resolution 177 (II) of November 21, 1947.

Finally, it might be useful to recapitulate the main propositions which seem to have emerged from the foregoing discussion.

(1) Individual criminal responsibility for violations of the law of war is now firmly established.

(2) It is not a defence to plead that when the offence was committed there was in existence no tribunal to exercise jurisdiction.

(3) The maxim *nullum crimen sine lege*, although widely accepted as a fundamental principle of justice, should not become an instrument of injustice by imposing an arbitrary limitation upon State sovereignty. In practice, therefore, special circumstances may make it necessary or expedient temporarily to suspend or modify the wholehearted observance of this principle.

(4) The doctrine is of no real significance in international law in the case of murder and other heinous crimes, particularly when the latter are committed on a large scale in pursuance of an organised national policy.

(5) It would be unwise to require of international law, at such an early stage of development, the strict adherence to basic principles of jurisprudence that is usually to be found in systems of municipal law.

(6) The major war criminals of Germany and Japan had little cause to complain of injustice seeing that solemn warnings of impending retribution had repeatedly been given by the Allies.

(7) The judgments of war crimes tribunals have added impressive weight to the view that the law of war must be looked upon not as the creature of statute or convention alone, but, to a large extent, as a body of customary rules whose origin is to be found in the actual practice of States.

In consequence, there can be little doubt that those acts which the tribunals adjudged to be war crimes more often than not already constituted violations of the acknowledged customary rules and practices of warfare.

N. C. H. Dunbar.

THE SCOPE OF JUDICIAL REVIEW

SHERIFF MIDDLETON, in a very kindly comment[1] on my notes on the *Franks Report*, doubts whether the courts in Scotland have the power to review a decision of an administrative tribunal akin to the power to review where an error of law appears on the face of the record (which is sometimes available by means of the order of *certiorari* in England). I had suggested that such a power exists, though not *eo nomine*. Since the question is of some importance I am tempted to essay some justification of my assertion.

In the first place it will be as well to clarify the issue. The phrase " error of law on the face of the record " has come into prominence in recent years in connection with the order of *certiorari* as a result of *R.* v. *Northumberland Compensation Tribunal, ex p. Shaw*,[2] where it was demonstrated that the order would lie where an inferior court, acting within its jurisdiction, had erred by deciding the merits of the case upon a wrong principle of law, and this wrong principle was apparent on the face of the record—the order was a " speaking " or reasoned order. In the particular case the order disclosed that the compensation due to a local government officer, on the termination of his employment as a result of the coming of the National Health Service, had been calculated on the wrong principles. In other words, the fault is not a jurisdictional one but one of a misconception of the law governing the merits which is apparent. The question of the existence of this power has not become an academic one as a result of the Tribunals and Inquiries Act, 1958 ; if anything it has gained in importance. It is true that section 9 somewhat extends the possibility of any person who is dissatisfied on a point of law with the decisions of certain tribunals either appealing to the Court of Session or requiring the tribunal to state a case for the opinion of that court. To that extent the need for an action of reduction is diminished, although the tribunals concerned are limited. On the other hand section 12 requires (subject to exceptions which do not here concern us) any tribunal specified in the First Schedule to the Act to give reasons for a decision, if so requested. The object here was to increase the scope for *certiorari* in England (since in modern times before the Act " speaking orders " were exceptional), and the present question clearly affects the consequences of the section in Scotland. Unless the disputed jurisdiction exists the statement of reasons is, in law, immaterial, although in practice it may, or may not, induce the parties to accept a particular decision with better grace.

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[1] 1958 *Juridical Review*, 183. There is, of course, excluded any consideration of the special jurisdiction under the Court of Exchequer Act, 1856, s. 17, which, in Exchequer causes would still enable the Court of Session to do whatever *certiorari* could do, at least as that writ existed in 1856.

[2] [1952] 1 K.B. 338; and see S. A. de Smith, *Judicial Review of Administrative Action*, 294 *et seq.*

It seems desirable in this discussion to distinguish tribunals from arbiters. The former are creations of general law, and their jurisdiction is founded upon compulsion, not consent. The arbiter's jurisdiction is founded on, and defined by, the agreement of the parties.[3] There are thus good theoretical grounds for differences in the kind and degree of control exercised by the courts over the two groups. There are, moreover, good historical reasons for this differentiation. The scope of review of arbitration awards was declared by the Act of Regulations, 1695, limiting the grounds of reduction to corruption, bribery or falsehood, and this has thenceforward, despite later statutory interventions, dominated the discussion. The problem of the control of administrative tribunals is, in one sense, also of long standing; in 1683 the court of session was enforcing the rules of natural justice upon such bodies.[4] Yet its history is substantially different and, even at this early stage, the two problems were not linked. A fresh start in relation to judicial review was, in effect, made after the Union. Lord Kames commented, in a passage [5] which I have quoted elsewhere but which deserves repetition, " . . . it is the province, one should imagine, of the sovereign and supreme court, to redress wrongs of every kind, where a peculiar remedy is not provided. Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have with reluctance been forced to listen to complaints of various kinds, that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session, which, daily increasing by new matter, will probably in time produce a general maxim. That it is the province of this court to redress all wrongs for which no other remedy is provided." This generality of the jurisdiction underlies all the cases in this field and there is an echo of Lord Kames in the words of Lord Justice-Clerk MacDonald, " Now I think it cannot be disputed that the supreme court is open to every citizen who complains of a wrong done in an inferior court." [6] It would be wrong to suggest that the course from the prophecy of principle by Lord Kames to the assumption of principle by Lord Justice-Clerk MacDonald was smooth, continuous or clear. All that is suggested is that the principle of control did get established, though its limits need examination. Lord Kames himself drew attention to the vagaries of the court, contrasting the refusal to interfere in *Mackenzie of Highfield* v. *Freeholders of the Shire of Cromarty* (1758), with a readiness to interfere in *Malcolm* v. *Commissioners of Supply for the Stewartry of Kirkcudbright* (1757). At this stage it is worth noticing that, when the general question of the jurisdiction of the Court of Session to review proceedings of Commissioners of Supply was in issue, it was conceded that the jurisdiction existed even where the proceedings were not intrinsically null,[7] the grounds being, apparently, that the refusal of a remedy would be to deny public rights.

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[3] The contractual element is particularly strongly stressed in *Holmes Oil Co., Ltd.* v. *Pumpherston Oil Co., Ltd.* [1891] 18 R.(H.L.) 52, which, as Lord Dunedin later said, was a case of as wrong a determination by an arbiter as might well be. Contrast the remarks of the Lord President (Clyde) on the operation of consent as to an inferior tribunal in *McCallum* v. *Arthur*, 1955 S.C. 188; S.L.T. 194.

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[4] *Earl of Roxburgh* v. *A Minister* (1683) Mor. 7328.

[5] *Historical Law Tracts* (4th ed.) 228.

[6] *Jeffray* v. *Angus*, 1909 S.C. 400, 402; 1909, 1 S.L.T. 84. See too *Collins* v. *Judge of High Court of Admiralty*, Mor. 7451, " The Lords considered the case as affording an example of a wrong to which no ordinary remedy could be applied, but for which their supreme jurisdiction authorised them to provide an extraordinary one "—or *Ross* v. *Findlater* (1826) 4 S. 514, 518, where Lord Pitmilly speaks of the general powers which must exist somewhere to redress a wrong.

Thus from the start it appears that the cases ran upon somewhat different lines from the arbitration cases. For these reasons, of principle and history, it is thought that cases such as *Mitchell* v. *Cable*[8] (upon which reliance was made) do not necessarily govern. Nor can *Robson* v. *Menzies*[9] rule, for review of proceedings in the Small Debt Court was very narrowly confined by statute in words which, as Lord Dunedin there pointed out, were very close to those of the Act of Regulations. It is true that the distinction has not always been made. Words akin to the admission of the privilege of an arbiter going wrong on the merits are, for example, to be found in *Heritors of Corstorphine* v. *Ramsay*,[10] where Lord Succoth observed, "Though therefore the presbytery, in its judgments is beyond appeal, yet they must obey the statute. If then they exceed their powers, or refuse to give effect to those entrusted to them there must be a remedy somewhere." This can be construed as indicating merely a power to control on grounds of jurisdiction, and later cases could support this view.[11] Despite these cases there seems, in principle, to be a distinction between the control of tribunals and the control of arbiters, and, in practice, over the whole range of cases the two groups have gone different ways, as will be apparent from some of those later cited.

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[7] *Ross* v. *McKenzie*, March 10, 1774, F.C.

[8] (1848) 10 D. 1297.

[9] 1913 S.C.(J.) 90, 2 S.L.T. 90; see too for an earlier illustration of this same limitation *Sempill* v. *Alexander*, Jan. 19, 1810, F.C.

[10] March 10, 1812, F.C.

[11] *Don Bros., Buist & Co., Ltd.* v. *Scottish Insurance Commissioners*, 1913 S.C. 607, 1 S.L.T. 221, where the Lord President (Dunedin) relied (at p. 612) on the analogy of an arbitration. Any appeal to the courts was, however, held to be excluded by the statute in question: thus the case does not affect the issue of the general principle now in dispute. That analogy was also relied on by Lord Loreburn in *Board of Education* v. *Rice* [1911] A.C. 179, 182, in a passage adopted in *Bennett* v. *Scottish Board of Health*, 1921 S.C. 772, 776, 2 S.L.T. 95, and in *M'Ewen's Trustees* v. *Church of Scotland General Trustees*, 1940 S.L.T. 357, 360.

The difficulty is that a decision which is contrary to law can be regarded as being *ultra vires*, and that, as Lord President Hope said in the *Heritors of Corstorphine Case*, " In all questions pleas of competency come to be much blended with questions of merit." Undoubtedly the general power which Lord Kames desired, and which Lord Justice-Clerk MacDonald appears to admit, could, if too freely used, be an embarrassment, not a safeguard, since it would thwart the whole intention underlying the establishment of administrative tribunals. The necessary limitation of review has not always been obtained by purely logical processes, and one result, it is thought, has been an over-emphasis of the jurisdictional aspect, even where control was really being exercised over substance. It must readily be admitted that a substantial number of citations could be produced to show that the Court of Session would only interfere where there was a defect of jurisdiction and not a mere error in reaching a conclusion. To those already referred to could be added *Simpson* v. *Harley* [12]—" It is said, however, that there has been an excess of power. But what does the alleged excess amount to? To nothing more than that the judge has put an erroneous construction on the statute. Now, assuming that he has done so, that is merely an error of judgment, not an excess of power." The weight of such cases, however, needs examination. In some what was being attempted was a review on the facts [13]; in others the remarks are *obiter* because it is clear that the tribunal was in fact doing what it was supposed to do.[14] In still more of the cases the statutory background must be borne in mind. Often the " finality " provisions in relation to the inferior tribunal are strict,[15] and while they do not entirely exclude the possibility of review they clearly have a limiting effect. These cases, then, may be regarded as either irrelevant to general principle, being dependent upon particular statutes, or else, to the extent that the limiting provision is relied upon, as suggesting that the power to review might exist apart from that provision.

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[12] (1830) 8 S. 977, 979; for other cases see the following notes.

[13] *e.g.*, *Lord Advocate* v. *Stow School Board* (1876) 3 R. 469; *Marshall* v. *Ardrossan* (1879) 7 R. 359.

[14] *e.g.*, *Bennett* v. *Scottish Board of Health*, 1921 S.C. 772, 2 S.L.T. 95.

Against all these cases must be put another range. There is a substantial number of older cases in which the court did exercise a power to review for error, in relation to such bodies as courts-martial, Commissioners of Supply, or local authorities. Three of these are notable. In *Patullo* v. *Sir William Maxwell*[16] the court undertook to review a decision of the commissioners under the comprehending Act (although in an earlier case[17] it had declined such jurisdiction) and it is reported that "The Court in general were of opinion that, although bills of this kind ought not to be passed except where very good and sufficient reasons are shown, yet that power of reviewing the sentence of the commissioners arising from their inherent and constitutional jurisdiction was not excluded by the statute." It is true that the case could be regarded as going solely to jurisdiction, not merits; but this does not seem to have been the attitude of the court.[18] The second case is clearer. In *The Countess of Loudoun* v. *The Trustees of the Highroads of Ayrshire*[19] the precise point was taken, the analogy with the English writ of *certiorari* drawn, and the report continues: "The court was of opinion . . . that a right to review, in case of the smallest excess of power, was essential and was not excluded by the words of the Act. It could not be supposed (it was observed) that the trustees or justices were meant to be themselves the sole and exclusive judges of their own powers, or that such a jurisdiction, which might even be held in some measure unconstitutional, was intended to be given. In this way the question of competency came to be blended with the question of merits; and with respect to *this last*[20] the court was clear that the trustees had done wrong in shutting up a road as a by-road which had, by a judgment of the Supreme Court, been found a public and useful road to the county." The third, *Chivas* v. *Duke of Gordon*,[21] in which review was refused, is equally interesting. "It was conceived on the one hand that the Supreme Court was bound to give redress in every case where a lieutenancy had exceeded the powers committed to them, or proceeded in opposition to the Act of Parliament, and therefore it was absolutely necessary to inquire into the merits of this case whether the jurisdiction of the court by means of advocation over suspension was excluded. . . . But the majority of their lordships could not get over the express and direct terms—in which advocation and suspension are excluded by the statute." This report suggests that there was unanimity in the fundamental jurisdiction; it was only lacking in the effect of the statute.

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[15] *Robson* v. *Menzies*, 1913 S.C.(J.) 90, 2 S.L.T. 90, or *Wilson* v. *Leith Walk Trustees* (1831) 9 S. 725. Where the clause is not so strong, as in *Milne and Co.* v. *Aberdeen District Committee* (1899) 2 F. 220, like statements are to be found, but are not compelling. In that case it was said that finality must refer to matters both of fact and law, but it was clear on examination that the decision sought to be reviewed was one which was properly taken in all respects.

[16] June 25, 1779, F.C.

[17] *Foote and Marshall* v. *Stewart*, Aug. 9, 1778, F.C.

[18] It could be said to be concerned, in modern terminology, with jurisdictional facts; those however come so close to merits that they are at times indistinguishable.

[19] May 28, 1793, F.C.

In later cases the two forms of review for *ultra vires* and for wrongful use of power appear to have been both recognised. The distinction is made in *Campbell* v. *Brown*[22] by the Lord Chancellor (Lyndhurst) "Cases were cited at the Bar, and mentioned in the printed papers now on your Lordship's table, in which the Court of Session has exercised a superintending authority over inferior jurisdictions when they have been guilty of an excess of their jurisdiction, or have acted inconsistently with the authority with which they were invested." Even if the latter phrase was intended to cover defects of procedure,[23] that was not so in *Pryde* v.

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[20] Italics supplied.

[21] July 11, 1804, F.C.

[22] (1829) 3 W. & S. 441, 448.

[23] See the proceedings in the Inner House (1825) 4 S. 174.

Heritors of the Kirk Session of Ceres,[24] where even Lord Cockburn, denying review in this particular case, would yet have admitted it where an error of law had been made (which (at p. 557) he distinguishes from wrongful proceedings). What Lord Cockburn was opposed to was a review of the facts, assuming that for the rest the proceedings were regular.[25] The case is notable since on the one hand it is an example of the general controlling jurisdiction of which Lord Kames spoke (Lord Cockburn in his *Journal* speaks of it as being in effect an assumption of jurisdiction) and on the other as illustrating the difficulty of distinguishing a review on the factual merits as distinct from a review on legal principle.[26] The case does not stand alone. Others can be added in which, if the relevant principles had been misconstrued by the inferior tribunal, review was granted.[27]

It was, however, this difficulty of distinguishing law and factual merits which became more obvious during the nineteenth century. Attempts were made to thrust the whole business of various new administrative agencies upon the court, so that Lord Justice-Clerk Boyle cried out: "We cannot be called on to fix whether there is to be a lamp at this point and a watchman at that."[28] Despite that cry the Lord Justice-Clerk upheld a jurisdiction to review in case of flagrant excess of power or deviation from the statute, and did exercise the power of interpreting the statute for police commissioners whose decisions were expressed to be final. In that case it is true that Lord Alloway declared that "the great distinction is that when this Court has no previous jurisdiction, it requires express terms to exclude [review]. But when there is no previous and radical jurisdiction, and the inferior jurisdiction is created by statute, the question comes to be determined on this ground: ' Have the parties intrusted with powers exceeded them? ' "—a phrase which could limit the review to jurisdictional faults. That phraseology is, however, simpler than the issues; it echoes words of Erskine [29] which on the face of them would limit control to *ultra vires*, yet, if Lord Ivory's notes are read, it is clear that the words must be given a wider interpretation, and the same is true of phrases such as those of Lord Alloway. The flagrant abuse, of which he speaks, becomes the unreasonable decision of modern phraseology, and his excess of power tends to cover more than might be suspected.

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[24] (1843) 5 D. 552.

[25] This attitude is reflected in his comments in the case and on the Poor Law in Scotland in general—see Cockburn's *Journal*, Vol. II, p. 1, and his later comments on the advantages of the interposition of the commissioners on such matters of fact—*Journal*, II, p. 257.

[26] See, particularly, Lord Cockburn (1843) 5 D. at 558.

[27] *Young* v. *Milne*, June 28, 1814, F.C.; *Mitchell* v. *Morrison* (1832) 10 S. 230.

[28] *Guthrie* v. *Miller* (1827) 5 S. 711; a similar sort of fear moved the court in *Imray* v. *Deputy Lieutenant of Inverness*, Mar. 2, 1811, F.C. (a case of refusal to review for many motives—failure to exhaust other remedies, a finality charge, but above all, this fear of the court becoming immersed in the business of the inferior body).

It appears, then, that while the possibility of review for error was recognised so too were the dangers of that course and, in seeking to limit review within reasonable bounds, too much emphasis may later have been placed upon the jurisdictional limitation as a convenient devise to attain a desired end. Such a formulation had obvious advantages over limitations which depended upon whether the violation was flagrant, or a minor one, but it has obscured, it is thought, the full scope of the power to review. Yet even later in the nineteenth century the full scope is apparent. *Robb* v. *School Board of Logiealmond* [30] is a good example. The school board could, on certain grounds, refuse a retiring allowance to a parish schoolmaster, and one was refused. In the first instance the court directed the board to give reasons for their refusal. Having got the reasons the Lord President (Inglis) said: " The Board are entitled to take into account the grounds on which the dismissal had taken place in deciding whether they would grant a retiring allowance. The ground stated, if well founded, will prevent him having a right to a retiring allowance." In other words, the court first secured the completion of the record and was then prepared to pass on the validity of the principles which it showed had been operative, but did not go into the factual situation. This is in essence a review for error of law on the record. In another case the same Lord President appears to concede a like power. " It may be doubted whether it does not appear on the face of this deliverance that the Board of Education failed to apply their minds to the real question before them . . . and proceeded to a decision on some view of expediency or *mero arbitrio*."[31] It is true that he regarded that as a narrow and critical view on which to strike down the decision, and chose to do that upon broader grounds; yet the jurisdiction to review on the first ground—the principles of the decision—is admitted.

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[29] *Institutes*, I.11.7.

[30] (1875) 2 R. 698; and see *Morison* v. *Glenshiel School Board* (1875) 2 R. 715, particularly at 725.

The emphasis on control of jurisdictional faults is aided too by the number of such cases, and by the fact that in the great majority of cases this ground alone provides an adequate safeguard. Upon it the existence of essential jurisdictional facts can be examined, and the interpretation of the relevant statutory framework can be controlled,[32] patent illegalities can be prevented,[33] procedure can be corrected[34] and motives reviewed.[35] Few cases arise where any other jurisdiction is required, partly because these heads themselves have received so wide an interpretation. The phraseology of *Caledonian Railway Co.* v. *Ogilvy*[36] may at times look to jurisdiction yet the court was there performing essentially the same function as that in the *Northumberland* case. Even so, outside such cases there remains a readiness to insist that the inferior tribunal should apply their mind to the real issue as it is conceived to be by the superior court.[37] Thus, while disclaiming any right to act as a court of appeal, Lord Birnham in *Magistrates of Ayr* v. *Lord*

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[31] *Lochgilphead School Board* v. *S. Knapdale School Board* (1877) 4 R. 389.

[32] *Sitwell* v. *Macleod* (1899) 1 F. 950; 7 S.L.T. 62; *Donaldson's Hospital* v. *Esslemont*, 1925 S.C. 199, S.L.T. 92; *Hood-Barrs* v. *British Wool Marketing Board*, 1957 S.C. 72, S.L.T. 153.

[33] *Lord Advocate* v. *Police Commissioners for Perth* (1869) 8 M. 244.

[34] *Moss Empires* v. *Assessor of Glasgow*, 1917 S.C.(H.L.) 1; 1916, 2 S.L.T. 215.

[35] *Caledonian Ry.* v. *Glasgow Corporation* (1905) 7 F. 1020; 13 S.L.T. 350.

[36] (1853) 15 D. 410; (1855) 18 D.(H.L.) 20; 2 Macq. 229.

[37] *Lord Advocate* v. *Stow School Board* (1876) 3 R. 469, 473; *Sinclair* v. *Moulin School Board*, 1908 S.C. 772, 779; 15 S.L.T. 1032.

Advocate[38] was nevertheless prepared to consider the principles upon which a Commissioner had formulated his report after a local inquiry, and then to conclude that the inquiry had been conducted upon the wrong lines. Similarly, Lord Cooper was prepared to consider whether a committee, acting within their jurisdiction, had yet " acted illegally by applying their minds to the wrong question and thus, in effect acting *ultra fines compromissi*." In substance what the court was doing in *Hayman* v. *Lord Advocate*[39] (from which the quotation is taken) was to control the tribunal in relation to the interpretation of the tests upon which that body was to decide the issues entrusted to it.

In such cases it appears that essentially the court is doing just what was done in the *Northumberland* case and in *R.* v. *Medical Appeal Tribunal*,[40] and is continuing to exercise power which, it is thought, is long established though not always clearly expressed. On the one hand the jurisdiction cases have been extended, so that their scope is broader than the classification suggests. On the other hand the " error " cases are often couched in language like that of the jurisdiction cases so that their separate existence is not emphasised. This phraseology, too, is of long standing. " If," runs the report in *Lord Prestongrange* v. *Justices of Haddington*,[41] " they exceed their bounds and find that to be an abuse which in reality is no abuse they so far assume a jurisdiction which they have not and their proceedings must be null." Thus the court was forced to try the legal essence of the complaint in order to determine jurisdiction. Perhaps this confusion of jurisdiction and merits is inevitable. In so far as " merits " depend upon the interpretation of the statutory principles to be applied by a tribunal, questions involving them are too closely interwoven with questions of jurisdiction to be satisfactorily separated. This inherent confusion of issues is reflected in the confusion of language found in some of the cases, but it also means that, if one form of review—as to jurisdiction—is accepted and founded upon general principle, then it leads almost inevitably to the other form of review. Such it seems is one possible interpretation of the history of these cases.

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[38] 1950 S.C. 102, 110; S.L.T. 257, 262.

[39] 1951 S.C. 621 at 632, 1952 S.L.T. 209 at 216.

[40] [1957] 2 Q.B. 584.

[41] (1756) Mor. 7350.

Admittedly the scope of review has fluctuated, and some of the earlier cases occurred at a time when the Court of Session would interfere more readily and more extensively than it would now. Yet despite this fluctuation there is also continuity, although the power which emerges is a restrained one. Some of the influences working towards restraint have been noticed. In more modern times these remain operative, and to them has been added a reticence over statutory interpretation.[42] Provided that the interpretation put upon its powers by the inferior tribunal is a reasonable one the court will, it seems, be reluctant to interfere. Moreover, the power as it emerges in Scotland is not, it seems, the same as that exercised by the Queen's Bench Division through certiorari, although there is a general similarity.[43] Because of differences in legal system and general background there is perhaps in the Scottish power a greater pliability, and less technicality, for despite reform the system of review based on certiorari continues to suffer from rigidity and procedural limitations which make it a less efficient instrument of justice than it might be.[44] On the other hand the generality and lack of technicality, which work to the advantage of the forms of review in Scots law, also contribute something to the uncertainties of scope which have been discussed. But the full scope of the power of review under Scots law which has here been urged, although it must be restrained (as Sheriff Middleton rightly emphasises), can in certain cases be necessary in order to ensure that justice shall be done. To accept jurisdictional review and to deny review for error on the face of the record is to assert that patent injustice may be remedied; covert injustice will not be. That situation appeared to the writer to lack logic and to be inconsistent with the origins and basic principles of the whole of this jurisdiction in Scotland, and reading the cases in that light they do not, with respect, appear to make acceptance of that situation inevitable.

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[42] *M'Ewen's Trustees* v. *Church of Scotland General Trustees*, 1940 S.L.T. 357, 360.

[43] It may even be that the power is somewhat wider, extending to cases where, although the "record" does not show the error, yet the conclusion reached is such that it is only explicable on grounds of error. Such a power may, on occasion, be necessary because of the limits of the "record" of the inferior tribunal, and it was such a power which was apparently exercised in *Robb* v. *School Board of Logiealmond* (note 30, *supra*).

[44] *R.* v. *Patents Appeal Tribunal, ex p. Baldwin & Francis, Ltd.* [1959] 1 Q.B. 105.

J. D. B. MITCHELL.

OFFICE OF MASTER OF REQUESTS

THE first mention of a master of requests to the King of Scotland is in 1514 when James Ogilvy, rector of Kinkell and commendator of Dryburgh, is noted as holding the office.[1] In subsequent years he appears frequently as a royal intermediary with the papacy.[2] His salary in 1554 was £100 Scots.[3] The office is variously described as *magister libellorum supplicum*,[4] *supplicationum*,[5] *requestarum*,[6] *requestuum*,[7] and once as " lord of requeistis."[9] Between 1581 and 1584 John Young of Harperdene appeared as *deputatus directoris requestuum*.[10] For a time James VI's Queen had her own master of requests.[11]

To begin with the master of requests was not a member of the Privy Council[12] but later he became one and was also named as one of the officers of state[13] with a place in Parliament.[14] As early as 1587 the secretary depute and master of requests depute are mentioned together,[15] both of whom were to have access to the Council and also to attend when commanded.[16]

There seems to be no correspondence other than the name between the Scottish master of requests and his English and French counterparts. The English master of requests was one of the judges or advocates of the poor in the " poor man's court " set up under Henry VII.[17] This court of requests was under the direction of the Lord Privy

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[1] *Letters of James V*, 10.

[2] *Ibid., passim.*

[3] *Register of Secret Seal* (hereafter *RSS*), iv. 2831.

[4] *Register of Great Seal* (hereafter *RMS*), viii. 1735, 2190.

[5] *Ibid.*, iv. 2999; v. 724.

[6] *Ibid.*, iii. 9, 170.

[7] *Ibid.*, v. 248. "*Supplic. libellar.*": Scotstarvet, *Staggering State* (Grampian Club), 139.

[9] *Register of Privy Council* (hereafter *RPC*), v. 755.

[10] *RMS*, v. 248.

[11] *Works of William Fowler* (Scottish Text Society), iii. preface, xxiii.

[12] *Acts of Parliaments of Scotland* (hereafter *APS*), iii. 150.

[13] *Ibid.*, iii. 229, 444; *RPC*, iv. 425.

[14] *APS*, iv. 260 *et passim.*

[15] *Ibid.*, iii. 444.

[16] *Ibid.*, iii. 150.

[17] *Select Pleas in Court of Requests* (Selden Society), preface, *passim.*

Seal.[18] The French *maîtres de requêtes* were more akin to the Scottish lords auditors. They were triers of petitions which had been submitted either to the King (*maîtres de l'hôtel du roi*) or to the Parliament (*maîtres du palais*).[19] There is an isolated suggestion of this auditorial function in the Scottish master of requests. In 1568 parties in dispute about a kindly tenancy were ordained by the Privy Council to appear before the master of requests and Mr. John Wood, a lord of session, in the master of requests' "chalmer" where the evidence was to be heard.[20] However, the master of requests' main function partook of the duties of both a clerk of council and King's secretary. He prepared council business,[21] receiving petitions from supplicants and presenting them for consideration by the council.[22] After 1603 he also acted as an intermediary between the Council in Scotland and the King in England, transferring petitions from one to the other.[23] In 1617 when James VI revisited Scotland petitions to the King were to be classified by a number of councillors including the master of requests and he was to present the suitable ones for the King's consideration.[24] He also claimed the right (to the exclusion of the clerk register) to present petitions to Parliament.[25]

The secretarial functions of the master of requests were of greater importance after the King had gone to England. Sir William Alexander (master of requests from 1614 to 1628 [26]) was virtually a second secretary; and when he was actually created second secretary by Charles I,[27] the first secretary, Melrose, resigned in pique [28]—because, according to Scotstarvet, the signet was taken away from him.[29] Sir James Galloway, who had been master of requests extraordinary in the 1620s[30] referred to himself (in 1641) as "one of his Majesties Secretarayes and Master of Requests"[31] and he was so confirmed by the King.[32] But the covenanting party which by then controlled the Privy Council found that this conjunction of offices was incompatible with parliamentary appointments and the King's advocate refused to take the matter up for him in Parliament.[33]

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[18] D. L. Keir, *Constitutional History*, 23–24.

[19] *Acta Dominorum Concilii*, ii (1496–1501), preface, xxx–xxxi.

[20] *RPC*, i. 608.

[21] 2 *RPC*, viii. 257.

[22] *RPC*, vi. 356; 2 *RPC*, vii. 149, 482; viii. 257; *APS*, iii. 97, 151.

[23] *RPC*, i. 159, 324, 340, 341; xi. 121–122; 2 *RPC*, viii. 257.

[24] *RPC*, xi. 121–122; *cf. Staggering State*, preface, 33.

[25] *APS*, v. 161.

[26] MS. RSS, lxxxii. 326; *vide infra*, notes 62, 64.

[27] 2 *RPC*, i. 232–233; *RMS*, viii. 970.

[28] *Haddington Memorials*, i. 169–170; ii. 89, 145–147.

[29] *Staggering State*, 74.

The office apparently expired under Cromwell, the last master being appointed in 1648 or 1649.[34] The office was later merged with the secretaryship.[35]

PETER G. B. MCNEILL

LIST OF MASTERS OF REQUESTS[36]

JAMES V

	Earliest date[37]	*Latest date*
James Ogilvy, rector of Kinkell,[38] commendator[39] and abbot of Dryburgh[40]	*April 2, 1514*[41]	*May 30–July 19, 1518*[42]
	MARY	
John Hay, vicar of Brechin,[43] parson of Monymusk,[44] prior of Monymusk,[45] abbot and commendator of Balmerino[46]	Oct. 16, 1554[47]	*July 17, 1565*[48]
Thomas Hepburn, parson of Auldhamstocks[49]	May 17, 1567[50]	

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[30] *Mar & Kellie*, i. 107; *Staggering State*, 139; *vide infra*, note 67.

[31] 2 *RPC*, vii. 482.

[32] *Ibid.*, vii. 269–270, 484–485.

[33] *Ibid.*, vii. 270–271, 275.

[34] *Staggering State*, 139; *APS*, vi (ii). 317.

[35] *Staggering State*, preface, 33.

[36] My thanks are due to Mr. John Imrie for checking this list.

[37] Dates other than dates of appointment are italicised.

[38] Before August 13, 1516: *RSS*, i. 2796.

[39] August 13, 1516: *loc. cit.*

[40] After September 30, 1516: *RMS*, iii. 95.

[41] *Ibid.*, iii. 9 etc.; *Letters of James V*, 10 (June 13, 1514).

[42] Ogilvy died some time between these dates: *Letters of James V*, 61n.; *Acts of Lords of Council in Public Affairs*, 136.

[43] Until about December 6, 1562: *RSS*, v. 1159; *Thirds of Benefices*, 230 (1563).

[44] By 1561: *RSS*, v. 845.

[45] March 20, 1562: *ibid.*, v. 1009.

[46] December 6, 1562: *ibid.*, v. 1159.

[47] Date of appointment: *ibid.*, iv. 2831.

[48] *RPC*, i. 340–341.

[49] By February 19, 1567: *RMS*, iv. 1770.

[50] Date of appointment: *RPC*, i. 510. Since Hepburn had been a partisan of Bothwell and Mary, it is unlikely that he retained the office long after the victory of the Protestant lords in June–July, 1567: *cf. RPC*, i. 553, 565; forfeited August 16–18, 1568: *APS*, iii. 47; *Calendar of State Papers, Scottish*, ii. 479.

JAMES VI

John Hay	*Jan. 31, 1568* [51]	*Jan. 6, 1573* [52]
Mark Kerr, commendator[53] of and lord Newbattle,[54] first earl of Lothian,[55] extraordinary lord of session[56]	March 20, 1577–78[57]	
John Colville, precentor (chantor) of Glasgow	Sept. 29, 1578[59]	
Mark Kerr	*Aug. 28, 1581* [60]	
Sir Robert Kerr, master and second earl of Lothian[61]	April 8, 1606[62]	
Sir William Alexander, viscount,[63] and earl of, Stirling[64]	Nov. 12, 1614[65]	

CHARLES I

Sir James Galloway, earl of Galloway	Jan. 28, 1628[67]
Sir John Chiesley	March 15, 1649[68]

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[51] *RPC*, i. 607–608; mention of remission of thirds of Balmerinoch to an unnamed master of requests on January 23, 1571–72: *RPC*, ii. 112; *cf. Thirds of Benefices*, 241 (1563–64; 1567–70).

[52] Noted as dead: *RMS*, iv. 2232; *Edinburgh Testaments* (Scottish Record Society), 126.

[53] Resignation in favour of Mark II by his father, Mark I, of commendatorship, November 29, 1581: *APS*, iii. 276; 2 *RPC*, i. preface, cxxiii.

[54] October 15, 1591: *APS*, iii. 598.

[55] July 10, 1606: *RMS*, vi. 1774.

[56] Mark I resigned as extraordinary lord of session in favour of Mark II: November 12, 1584: Books of Sederunt.

[57] MS. RSS, xlv. 57; *ibid.*, xlv. 69 (July 28, 1578). In a paper, dated August 19, 1578, Mark II sought back his office as master of requests from which he appears to have been removed about June, 1578: *Calendar of State Papers, Scottish*, v. 318.

[59] MS. RSS, xlv. 94; Colville, *Letters* (Bannatyne Club), preface, xv. (November, 1578); *APS*, iii. 150 (November 11, 1579); *Calendar of State Papers, Scottish*, v. 648–649 (March 1, 1581); *Staggering State*, 139 ("James" Colville, 1579).

[60] *RMS*, v. 248.

[61] Succeeded his father, Mark II, April 8, 1609.

[62] Mark II resigned as master of requests in favour of his son Robert: MS. RSS, lxxv. 276; *RPC*, vii. 226, 745–746 (July 11, 1606).

[63] September 4, 1630; *RMS*, viii. 1653.

[64] July 14, 1633: *ibid.*, viii. 2173.

[65] MS. RSS, lxxxii. 326; *Scots Peerage*, viii. 172; *DNB* (1908), i. 278; *RPC*, x. 358 (July 11, 1615).

[67] Date of appointment as in Balfour, *Annals*, ii. 132; *RMS*, viii. 1272 (June 23, 1628); MS. RSS, cix. 173 (Mar. 26, 1640). Earlier, on October 18, 1621, he had been made master of requests extraordinary: MS. RSS., xciv. 7; *Mar & Kellie*, i. 107 (1622); and he probably became sole master of requests about October, 1627 (after Alexander was made secretary: *RMS*, viii. 970) without any formal appointment.

[68] Date of appointment: *APS*, vi. (ii) 317.

CASES AND COMMENT

1. SCOTTISH CASES

CONFLICT OF LAWS—marriage of minor domiciled abroad—parental consent.

Bliersbach v. *McEwen*, 1959 S.L.T. 81, is an important decision in the difficult area of law dealing with the attempts of persons domiciled elsewhere to marry in Scotland and thereby avoid the difficulty of lack of parental consent. A couple both domiciled in Holland, the female being aged eighteen, came to Scotland intent on marriage, but objection was lodged by the girl's father on the ground that he had not consented to the marriage, as he was required to do by the Dutch Civil Code. The couple sought declarator that despite the objections they were qualified to marry in Scotland. By which system, Scots or Dutch law, did their capacity to marry fall to be decided? This in turn depended on whether the lack of parental consent was *impedimentum dirimens*, which would have rendered any marriage void *ab initio*, or only *impedimentum impeditivum*, which merely prevented marriage until some obstacle were overcome, a distinction incorporated into Scots from canon law. Parental consent, it was held, fell into the latter category; it fell to be determined by the *lex loci celebrationis* as part of the formalities of the marriage, and was not an element of personal capacity determined by the *lex domicilii.* Scots law alone, accordingly, regulated their ability to marry and there was no barrier thereto. It is welcome to have this authoritative decision since many of the " runaway marriage " cases have failed to reach final decision.

The satisfactory legal outcome of this case may, however, mask its unfortunate social aspects. The frequency with which non-Scottish couples are resorting to Scotland in order to marry here, avoiding the formality of consent required in their own countries, is becoming a minor scandal and it may be that there is a case for alteration of the law. If so it should probably not take the form of imposing a requirement of parental consent on all Scottish marriages, but simply of a statutory requirement that, in the case of couples at least one of whom is domiciled furth of Scotland, all their domiciliary requirements for consent have been satisfied. To go further back, it is unfortunate that consent has been treated as partaking of the formalities of marriage (and therefore regulated by the *lex loci celebrationis*) instead of as being an element of personal capacity under the *lex domicilii*; but that view of consent seems to be well settled.

D. M. W.

LAW OF TENEMENT— liability of lower to upper proprietor.

The mutual rights and duties existing between the owners of separate houses in one tenement block are of wide importance but have not been much illustrated by modern decisions. *Thomson* v. *St. Cuthbert's Co-operative Association, Ltd.*, 1958 S.C. 380; 1959 S.L.T. 54, is an interesting recent instance. The owner of the second floor of a flatted tenement sued the owner of the ground floor for the cost of making good damage caused, it was alleged, by the fracturing of a roof-beam in the ground-floor premises which supported the first and second floors. An extensive examination of the institutional writers and of the older cases led the court to the view that, while the owner of the ground floor certainly owes a duty to support the upper floors, that duty is not absolute and he is liable in reparation for breach of that duty, not merely from the fact of collapse, but only if negligence on his part be relevantly averred and proved. As negligence was not relevantly averred in this case, the pursuer's claim fell to be dismissed. The court affirmed the principle that in this as in other departments of the law liability did not arise *ex dominio soli*, from bare ownership, but only from ownership plus failure in some respect to take the care which a prudent owner would take, as by inspection or maintenance. The decision is salutary as making clear the reasonable extent of the subjacent owner's liability, though it obviously renders more difficult the path of the prospective pursuer for damages, who has to aver and prove negligence as well as damage.

D. M. W.

JUSTICIARY— exceeding speed limit—radar speed meter.

The interest of *Farrell* v. *Simpson*, 1959 S.L.T.(Sh.Ct.) 23, lies in the evidence, in that the accused was convicted of having exceeded the speed limit in a built-up area on the evidence of two police officers who had been sitting in a car using an electromatic radar speed meter. It was an important factor in the decision, that the radar instrument was shown to have been adequately tested, and functioning accurately, and that no interfering factors were present; and it seems likely that in future cases, as indeed in this one, the defence will concentrate on trying to point to mistakes in these respects. This would appear to be the first time in Scotland that a conviction has been obtained on such evidence, but it is unlikely to be the last one, as the learned sheriff-substitute points out in his opinion that the possibility of human error creeping in seems less than in the usual case of the use of stop-watches. Given that the accuracy of the instrument is proved there seems no more reason for rejecting evidence obtained by radar than for rejecting the evidence of stop-watches or cameras.

D. M. W.

PROFESSIONAL NEGLIGENCE—chartered surveyor.

The precise duty of care owed by a chartered surveyor to his client was considered in *Stewart* v. *Brechin*, 1959 S.L.T.(Notes) 45, where the defenders had failed to notice woodworm and dry and wet rot in a mansion on which they were instructed to report and make a valuation. That duty, apart from any contractual modification, was " to display and apply reasonable care and a reasonable standard of professional competence in doing the work they were employed to do, provided that the work fell within the proper scope of their professional activities." But their report was not a guarantee of freedom from defects and, while any visible defect or suspicious fact should have been reported, there was no need to make an exhaustive search for possible latent defects of which there was no overt symptom. This is simply the application to a particular profession of principles already accepted in similar formulations in other cases.

D. M. W.

COMPANY—restriction in articles on transfer of shares.

The commonest topic of discussion in company law in recent months has been the " take-over " bid, whereby one company seeks to obtain control of another. *Lyle and Scott, Ltd.* v. *Scott's Trustees*, 1959 S.L.T. 198, was a case where the attempt was checked by a provision in the articles. This provided that no registered holder of more than one per cent. of the ordinary shares in the private company in question might transfer his holding for onerous consideration so long as any other ordinary shareholder was willing to purchase them at an agreed price, or a price to be fixed by the company's auditor. Certain shareholders agreed to sell their shares, each holding amounting to more than one per cent., to a party who was making a take-over bid, and it was held by the House of Lords, reversing the Court of Session, that they must comply with the procedure required by the articles, notwithstanding that they had already been paid the price and had handed over their share certificates. The House had little difficulty in disposing of the very strained interpretation which the respondents sought to put on the relevant article of the appellants' articles of association. The contention also advanced, that the respondents had not, despite having entered into contracts to sell their shares and having even received the purchase price, shown themselves " desirous of transferring " their shares, seems quite preposterous and was very rightly rejected by the House. In the result, accordingly, the respondents were declared bound to implement the relevant article by informing the secretary of the number of shares they desired to sell, so that the procedure provided therein for such circumstances might run its course.

D. M. W.

**CRIME—
murder—
self-defence.**

McCluskey v. *H.M. Advocate*, 1959 S.L.T. 215, raised a novel issue as to the special defence of self-defence in a trial for murder. M. was charged with murdering O. by beating and kicking. A special defence of self-defence was lodged, to the effect that O. had made an indecent suggestion to M., had seized him round the waist, and had pushed him towards a bed, and the presiding judge was asked to direct the jury that in these circumstances the killing was justified. He refused to do so, and his refusal was upheld by the High Court on appeal. In brief, resisting an attempt to commit sodomy does not justify homicide. M. was convicted of culpable homicide by the jury. There is little doubt that the desired directions, if given, would have been unprecedented and a material extension of the law of justifiable homicide as hitherto understood. The basic argument for the extension was that an attack on a man's virtue was as serious as an attack on his life and equally justified taking the life of the assailant.

This argument was rejected by the High Court, since there was no apprehension of danger to the accused's life, no evidence of real physical injury done to him, but merely a threatened attack on his virtue, which could surely have been repulsed without the need to kill the assailant. It is also significant that the deceased had suffered multiple serious wounds, consistent more with a violent attack than with death resulting from an act of self-defence. The judge's charge, and the opinions delivered on appeal, also contain useful restatements of the law of justifiable homicide in circumstances where self-defence has been established.

D. W. M.

CONDICTIO INDEBITI—error juris.

Glasgow Corporation v. *Inland Revenue*, 1959 S.L.T. 230, has given us a ruling on the application of the principle of *condictio indebiti* to a case of error in law. The corporation paid purchase tax on stationery manufactured by their own printing and stationery department for their own education department. It was now held, on a construction of the relevant orders, that the corporation were not liable to pay purchase tax, but that they were not entitled to recover the payments of purchase tax already made as a result of their error in statutory interpretation. The latter point is of greater general interest, and, assuming it to be a correct decision, the moral is clearly: if in doubt, don't pay, but wait for a judicial determination that there is a legal liability to pay. All the authorities bearing on repetition in case of error in law were canvassed and, despite considerable Scottish judicial dubiety in older cases, the view was arrived at that no *condictio indebiti* lies for error as to the general law. It may be a different matter where there is error as to particular law, as where payment is made under a misinterpretation of a will or trust settlement: such a case is not covered by the *ratio* of the present case. But even within the *ratio* of the present case is the decision satisfactory? It is rested mainly on the maxim *ignorantia juris neminem excusat*, but the issue is surely not one of *ignorantia juris* but of *error juris*, and error, moreover, as to a highly disputable point of statutory interpretation, which everyone knows is not an exact science. All through the cases, moreover, far too much attention has been paid to *obiter dicta* in English cases and too little to the inequitable result, whereby the Revenue is allowed to hold on to money which, it has now been decided, need not have been and should not have been paid to it. The court's answer to this last point is that equity demands finality, and B, C and D cannot be allowed to reopen transactions and recover payments if A induces the courts that the accepted interpretation was wrong. This argument, and the one that *ignorantia juris* is inexcusable and renders a *condictio* inequitable, fail to convince the present commentator. No doubt past transactions cannot be reopened but surely the man who makes the challenge should not be barred. It is valuable to have this controverted point so thoroughly discussed, and to have a decision thereon, even if it does not carry complete conviction; but it is worth bearing in mind that the case of error in law as to, *e.g.*, the interpretation of a will or contract, is still open. This case is clearly limited to error as to the general law.

D. M. W.

HUSBAND AND WIFE—nullity—decree of Vatican Court.

Di Rollo v. *Di Rollo*, 1959 S.L.T. 278, raised the interesting issue of the validity and effect, if any, in Scotland of a previous decree of the Rota annulling the marriage. The wife sought to divorce her husband for adultery, and alternatively sought declarator that decrees of the Rota of 1956 and 1957 annulling the marriage were valid in Scotland. The husband was born and domiciled in Italy; the wife was born in Scotland and had lived all her life in Scotland, and the marriage had taken place in Scotland according to Roman Catholic forms. It was averred that judgments of the Rota were recognised as valid by the courts of the husband's domicile. It was originally pleaded that decisions of the Rota had extraterritorial effect, but this was later amended to a plea that decisions of the Rota were effective in Italy, the country of the husband's domicile, equally with decrees of the Italian civil courts, and that accordingly recognition should be made of the foreign decree as being one effective to annul the marriage by the law of the husband's domicile. The Lord Ordinary allowed a proof on the issue of adultery, but rejected the alternative conclusion, holding that the Court of Session was not bound to recognise a decree of a court of the Roman Catholic Church annulling, according to the canon law, a marriage celebrated in Scotland. (It may be interposed that the decree of nullity was granted on the ground of absence of true consent to the marriage by the pursuer and appears to have been perfectly justifiably granted.) The Lord Ordinary pointed out that there was only one legal system in Scotland competent to annul the marriage, namely, the municipal law of Scotland, the *lex loci celebrationis*, by which system the marriage was admittedly valid, and that the decision of the Rota, however valid in canon law, was not recognised as having extra-territorial effect and was ineffectual by Scots law. Moreover, the Rota was not a court of the husband's domicile so that no question of the recognition of a foreign decree could arise: *Warden* v. *Warden*, 1951 S.C. 508; S.L.T. 406.

This is a decision of great interest and considerable importance, and it is really very surprising that the point has never been raised before. We are familiar with the " limping " marriage, still valid in one state but dissolved in another, but this presents the interesting spectacle of a marriage dissolved by canon law, but still subsisting by municipal law. There seems no reason to doubt the correctness of His Lordship's judgment, and this case is valuable guidance in a field hitherto unexplored.

D. M. W.

2. ENGLISH CASES

ARBITRATION —dispute between two co-operative societies—restraint of trade —arbitration award.

The recent decision of Streatfeild J. in *Birtley and District Co-operative Society, Ltd.* v. *Windy Nook and District Industrial Co-operative Society, Ltd.* [1959] 2 W.L.R. 415, is in direct contrast to the decision of the First Division in *Bellshill & Mossend Co-operative Society, Ltd.* v. *Dalziel Co-operative Society, Ltd.*, 1958 S.C. 400, 1959 S.L.T. 150. In the latter case it was held that on ceasing to be a member of the co-operative union a society was no longer bound by an arbitral award under union rules. In the English case the facts were similar in respect that a dispute had arisen between two co-operative trading societies, both members of the union, as to their respective trading areas, and the matter was referred to arbitration under the appropriate union's rule. An award was then made in the plaintiff's favour, providing that co-operative services should be provided exclusively by them in a specified area. Before the final award was made the defendants terminated their membership of the union and refused to accept or be bound by the award. The plaintiff society then brought an action claiming declaration that the award was binding on the defendants. The defendants contended *inter alia* that if the rules constituted a valid submission entitling the arbitrators to make an award affecting the defendant's conduct after ceasing membership, the contract between the parties contained in the union's rules was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they had ceased to be members of the union. It was held that the rule merely provided the machinery for settling disputes and did not, of itself, restrain anyone—it was not until the award was made that anyone could be restrained and there was nothing on the face of the award to indicate that it was an unreasonable restraint of trade. It was also held that the court was not entitled to look behind the award and become, in effect, an appellate tribunal from the arbitrators. Further, the defendants were not being restricted from carrying on business as they had formerly done and it was not unreasonable in the interests of commercial co-operative trading and of the public to prevent their extension to an adjacent area. The whole question is likely to be determined by a higher court when the argument which succeeded in the Scottish case will doubtless be more fully canvassed.

W. A. E.

INFERIOR TRIBUNAL—certiorari—decision of Patents Appeal Tribunal—whether error on the face of the record.

The question raised before the House of Lords in *Baldwin & Francis* v. *Patents Appeal Tribunal* [1959] 2 W.L.R. 826, was whether there was any error on the face of the record of the Patents Appeal Tribunal from whom no right of appeal lay to the courts and where, accordingly, the only remedy of the aggrieved party was by order of certiorari. The tribunal had reversed interim and final decisions of the Superintending Examiner whereby he ordered that there should be inserted in the respondent's letters patent a specific reference to the appellant's prior patent. The latter then attempted to reduce the tribunal's decision on the ground that it contained errors of law on the face of the record. The alleged errors involved misconstruction by the tribunal of the relevant specifications and, in particular, omitting to notice a particular alternative design. The court held, however, that this was not apparent from the face of the record. What in fact constituted the record did not have to be expressly decided. The court reserved its opinion as to whether this included not only the written judgment of the tribunal, but the patent specifications and the decisions of the Superintending Examiner. Lord Denning, however, thought they were part of the record. Doubts were cast by Lord Tucker on certain observations of the former judge in *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338. It is therefore now for the House of Lords, in an appropriate case, to decide what is the record in the case of a " speaking order." If there is no reasoned decision, the error of law, if such there be, will be undetected. The face of the record (as Lord Sumner put it in *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128, 159) will then be " the inscrutable face of the Sphinx."

W. A. E.

DEVELOPMENT —material change in the use of land—Town and Country Planning Act, 1947, s. 12.

In *Guildford Rural District Council* v. *Fortescue. Same* v. *Penny* [1959] 2 Q.B. 112, the facts were that a piece of land was used as a caravan site and the number of caravans on the site increased since 1947 from eight to twenty-seven. The question was whether this constituted " a material change of use " entitling the local planning authority to issue an enforcement notice against the increase. The local authority issued such a notice but the justices later quashed the notice, holding that the increase in the number of caravans did not constitute " development " within section 12 of the Act. The Court of Appeal held that the justices had power to quash the enforcement notice. They also held that assuming this land had at all relevant times been used as a caravan site, the question whether the increase in the number of caravans from eight to twenty-seven constituted " development " was not a question of law but of fact, and that it was not open to the Court of Appeal to interfere with the finding of facts by the justices. The court did, however, observe that an increase or intensification of use of land might amount to "a material change of use."

W. A. E.

DAMAGES—deduction for lump sum disablement gratuities under the National Insurance (Industrial Injuries) Act, 1946.

Two contradictory decisions have recently occurred on the question of what deductions are to be made in respect of lump sum disablement gratuities received under the National Insurance (Industrial Injuries) Act, 1946—in assessing damages payable to an injured plaintiff. In *Roberts* v. *Naylor Brothers, Ltd.* [1959] 1 W.L.R. 718, a steel erector was injured owing to his employers' negligence. His disablement was assessed at five per cent. and he received a lump sum disablement gratuity of £67 10s. It was held that the whole of this gratuity had "accrued" to the plaintiff in terms of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, and that half that sum must accordingly be deducted from the loss of earnings in assessing the damages awarded. In *Perez* v. *C. A. V., Ltd.* [1959] 1 W.L.R. 724, on the other hand, the injured workman's disability was assessed at nine per cent. and he received a lump sum disablement gratuity of £140. It was held that the deduction to be made under section 2 (1) was such sum as would bear the same proportion to half the gratuity as that part of the five years from the accident which remained unexpired when the gratuity was paid bore to the plaintiff's expectation of life.

W. A. E.

NEGLIGENCE—evidence of practice—meaning of the "Dunedin Formula."

Cavanagh v. *Ulster Weaving Co., Ltd.* [1959] 3 W.L.R. 262, which was an appeal to the House of Lords from the Northern Ireland Court of Appeal, is probably the most interesting recent English case to the Scottish lawyer involving, as it does, some general observations on the "Dunedin Formula." The result is to confirm the view expressed in *Morris* v. *West Hartlepool Steam Navigation Co.* [1956] A.C. 552, 579, that the "obvious folly" branch of the dictum is not meant to detract from the standards of the reasonable man and that no contrary indication is to be taken from the words of Lord Cooper in *Gallagher* v. *Balfour Beatty & Co.*, 1951 S.C. 712. Lord Keith of Avonholm was one of the court in the latter case and also gave judgment in *Cavanagh.* It is therefore of particular interest to see him confirm his view that Lord Dunedin did not intend to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen and that in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has been or has not been a failure to exercise reasonable care. Lord Keith also observed that Lord Dunedin was laying down no principle of law but was stating the factual framework within which the law would fall to be applied.

W. A. E.

FRUSTRATION OF CONTRACT —Blocking of Suez Canal.

In *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires* [1959] 3 W.L.R. 622, the facts were that, by written contract dated October 12, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Nice during October/November, 1956. Shipment in both cases was to be from Port Sudan. On November 2, 1956, the Suez Canal was closed to navigation, and remained closed until April 9, 1957. The alternative route round the Cape of Good Hope was more than four times as long, and freightage by this route nearly five times as costly. No goods were shipped under either contract by the sellers, who claimed that they were prevented from doing so by the events in the Middle East.

In an appeal from arbitration proceedings it was observed by Ashworth J. that a c.i.f. contract was not frustrated *ipso facto* if the usual or customary route was rendered impossible. He therefore held that, despite the differences involved *supra* in a voyage round the Cape, these were not such as to render performance by that route a thing radically different from that which was undertaken by the contract, nor was there involved such a change in the significance of the obligation as would call the principle of frustration into play. Neither of the contracts must be regarded as having been made on the basis that, if the Suez Canal was no longer available, the sales would be cancelled, because, following the observation of Lord Radcliffe in *Davis Contractors, Ltd.* v. *Fareham U. D. C.* [1956] A.C. 696, at 727, it could not be said that the parties " must have made " their bargain on this basis unless there was a fundamental commercial difference between performance by the two alternative routes.

W. A. E.

3. PRIVY COUNCIL CASES

DEVISE: Element of public benefit lacking.

Davies v. *Perpetual Trustee Company, Ltd.* ([1959] 2 W.L.R. 673) was an appeal from a judgment of the Full Court of the Supreme Court of New South Wales upholding a decision of a judge of that court sitting in equity. The question for decision was whether a devise contained in a codicil to a will was or was not a valid charitable devise. The parties agreed that the devise was invalid unless it could be upheld as being charitable. It was as follows: " I give and devise Block Seventy B upon which stands Ultimo House to the Presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures." The codicil, which was dated 1895, made the devise subject to the termination of certain life interests. In 1918 the then sole trustee of the will issued an originating summons in the Supreme Court of New South Wales in Equity asking whether, *inter alia*, the devise was a valid devise. The judge held that it was a good charitable trust, being an immediately vested remainder waiting only for the determination of the antecedent life estates of certain persons, and that when that remainder fell in it would become necessary to settle a scheme for the administration of the trust. The Full Court, in their decision given in 1919, upheld that view. They stated that the devise was not to or for the Presbyterian Church of Australia as constituted by the Presbyterian Church of Australia Act, 1900, but was for the benefit of certain individuals who were Presbyterians, and who came within a certain description, and that the object was to afford facilities for religious education. But the court further stated that the declaration that the devise was a valid charitable trust was without prejudice to the right of the beneficiaries or any of them under the will to contend that the *cy-près* doctrine was not applicable to the devise if the purpose was incapable of taking effect when the fund became available for the purpose.

After the death of the last of the life tenants interested in Block 70B, in April, 1957, the present appellant was granted special leave to appeal against the decision of the Full Court—forty years after that decision was given. The main contentions for the appellant were: first, that the element of " public benefit " was lacking in the trust which the codicil created; and, secondly, that the gift was void for uncertainty as to the persons for whose benefit the trust was created, the uncertainty arising from the meaning of the words " the Presbyterians," coupled with the words " those " and " their youth."

The Board stated that the gift was to a body of trustees described as " the Presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland." Their Lordships assumed, without deciding, that the words " the Presbyterians " in that context could be given a definite meaning. The class of " Presbyterians " must be ascertained as at January 21, 1897, the date of the testator's death. The word " Presbyterians " must clearly be implied after the word " those." " Hailing from " was not very explicit, but might be taken to refer to persons resident in the North of Ireland when they embarked for New South Wales. " Their youth " was limited to the children and remoter issue of the persons to whom as trustees the gift was made. A boy would only be eligible if (1) he was descended from a Presbyterian living on January 21, 1897; and (2) that Presbyterian was himself descended from a Presbyterian who had settled in the Colony; and (3) that settlor either hailed from or was born in the North of Ireland. It was to be observed at once that the object of the testator's bounty was, prima facie, a charitable object within the well-known classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* ([1891] A.C. 531, at p. 583), being concerned both with education and the advancement of a particular religious faith. But even in such gifts an element of public benefit must be present if they were to stand in the privileged position of a charitable gift.

Their Lordships would assume that the college to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they were unable to hold that the objects of the trust were either the community or a section of the community. They were clearly not " the community," for the testator had been at pains to impose particular and somewhat capricious qualifications on the persons who were to benefit from that education. Nor could those persons be " a section of the community " in the sense in which the authorities had interpreted those words. The nexus between the beneficiaries was simply " their personal relationship to several *propositi* "—namely, certain persons living at the death of the testator. Those persons were not in themselves a section of the community; they were certain Presbyterians who could establish a particular descent. Moreover, the qualifications which a boy must possess in order to benefit were in some respects wholly irrelevant to the educational objects which the testator had in mind. It could not be said that boys whose Presbyterian ancestors (living on January 21, 1897) traced their descent from emigrants from Northern Ireland were in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) were descended from emigrants from, for example, England or Scotland. In their Lordships' opinion the qualifications which the testator had laid down had the result of making the beneficiaries under the trust nothing more than " a fluctuating body of private individuals," and the gift failed because the element of public benefit was lacking The devise was not a valid charitable devise, and the appeal was accordingly allowed.

Dicta in *Verge* v. *Somerville* ([1924] A.C. 496, at p. 499) and *Oppenheim* v. *Tobacco Securities Trusts Co., Ltd.* ([1951] A.C. 297, at pp. 305, 306 and 309) applied. *Re Tree* ([1945] Ch. 325) distinguished.

" USE " OF LAND: Exemption from rating.

Newcastle City Council v. *Royal Newcastle Hospital* ([1959] 2 W.L.R. 476) was an appeal from a judgment of the High Court of Australia, affirming an order of the Supreme Court of New South Wales which had dismissed the present appellant's appeal from a judgment holding that the respondent hospital was not liable to pay rates in respect of a plot of land which it owned in the City of Newcastle, New South Wales. The respondent's hospital, which received patients suffering from tuberculosis, had about a hundred beds. It was set in grounds laid out with lawns and gardens. The grounds covered 17½ acres and were enclosed with a ring fence. Outside the fence the hospital owned 18½ acres of rough ground marked off by five white posts. Beyond that rough ground the hospital owned 291 acres of land still in its virgin state. Those 291 acres were traversed by ridges and gullies, which were heavily timbered, with a good deal of underwood. The gullies were steep and rough, some of them so steep as to be impassable. There was very little flat land. There were a few bush tracks, one of which was well defined, but there was no evidence sufficient to establish that it was used by patients or by the nursing staff. In short, there was no physical use by the hospital of the 291 acres: it was just vacant land. The appellant council claimed that the hospital was liable to pay rates on those 291 acres for the years 1946 to 1952 inclusive. It did not seek to make the hospital liable on either the 17½ acres or the 18½ acres. The trial judge held that the 291 acres were exempt from rates. A majority of the Supreme Court affirmed his decision, and a majority of the High Court of Australia upheld the judgment of the Supreme Court.

The relevant provision was section 132 of the Local Government Act, 1919, of New South Wales, which provided: "(1) All land in a municipality . . . shall be rateable except . . . (*d*) land which belongs to any public hospital . . . and is used or occupied by the hospital for the purposes thereof." The Board stated that rates were levied in New South Wales, not on the occupiers, as in England, but on the owners; and that they were calculated, not by reference to the annual value, as in England, but by reference to the unimproved capital value. And all land, occupied or unoccupied, was subject to the payment of rates unless it could be brought within one of the statutory exceptions. The respondent hospital was liable to pay rates on the 291 acres unless the land came within section 132. The hospital acquired all its land for the purposes of the hospital. When the latest portion of it was compulsorily acquired in 1946 the Government *Gazette* expressly stated that it was "resumed for the purposes of the Newcastle Hospital." According to the evidence those purposes were to keep the atmosphere clear and unpolluted, to prevent building upon the land and so act as a barrier against the approach of factories and houses, to provide quiet and serene surroundings for the patients, and to give room to expand the activities of the hospital. The land was undoubtedly acquired and owned for those purposes. But was it used or occupied for those purposes? Their Lordships were of opinion that it was used for those purposes. It was submitted for the appellant that an owner of land could not be said to use the land by leaving it unused, and that that was all that had been done here. Their Lordships could not accept that view. An owner could use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range used the land he had acquired nearby for the purposes of ensuring safety even though he never set foot on it. The owner of an island used it for the purposes of a bird sanctuary even though he did nothing on it except prevent people building there or disturbing the birds. In the same way the respondent hospital got, and purposely got, fresh air, peace and quiet, which were no mean advantages to it and its patients. True, the hospital would get the same advantages if the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous, or at any rate outside the control of the hospital. Here they were intended, and that made all the difference.

In those circumstances it was unnecessary to consider whether the hospital "occupied" the 291 acres, but their Lordships would say this: the hospital was undoubtedly in legal possession of those acres, for the simple reason that, where no one else was in possession, possession followed title. But legal possession was not the same as occupation. Occupation was matter of fact and only existed where there was sufficient measure of control to prevent strangers from interfering: see Pollock and Wright on *Possession in the Common Law*, pp. 12 and 13. Something must be actually done on the land, not necessarily on the whole, but on part in respect of the whole. A bombed site or an empty unlocked house was not "occupied" by anyone; a farmer "occupied" the whole of his farm even though he did not set foot on the woodlands within it from one year's end to another. Their Lordships had some doubt whether the hospital "occupied" the 291 acres, because they were not fenced or enclosed in any way and it was difficult to say that they were so much linked with the hospital grounds as to form part of the entire whole. But it was not necessary to come to a conclusion on that point. The hospital was accordingly exempt from the payment of rates, and the appeal would be dismissed.

"Before and at the beginning of the voyage."

Maxine Footwear Co., Ltd. and Another v. *Canadian Government Merchant Marine, Ltd.* ([1959] 3 W.L.R. 232) was an appeal from the Supreme Court of Canada, dismissing an appeal from the Exchequer Court of Canada which, in turn, had dismissed an appeal from a judgment of the Admiralty Court for the District of Quebec whereby the appellants' action as shippers against the respondents as carriers for non-delivery of their goods was dismissed. The first-named appellants were shippers and the second-named appellants consignees of cargo loaded on board the M.V. *Maurienne* at Halifax in February, 1942, to be carried to Kingston, Jamaica. The cargo and ship were destroyed by fire before the ship left Halifax. The second-named appellants assigned their rights to the first-named appellants. The contract of carriage was subject to the Canadian Water Carriage of Goods Act, 1936. By article III of the Act, headed: "Responsibilities and Liabilities: (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to, (*a*) make the ship seaworthy; . . . (2) Subject to the provisions of article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." By article IV, headed: "Rights and Immunities: (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. . . . Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier. . . . (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; (*b*) fire, unless caused by the actual fault or privity of the carrier." The bill of lading incorporated the Canadian Water Carriage of Goods Act, 1936.

The appellants were the shippers of three wooden crates and one drum of shoe leather and shoe findings. The loading of all cargo was completed on Friday evening, February 6, 1942. The intention was to sail on Saturday. On the morning of Friday three scupper pipes were found to be blocked by ice at the point at which they met the ship's side. The master instructed one of the officers to have those pipes thawed out, and that was done on Friday afternoon, the work being done by an employee (of a Halifax firm) using an acetylene torch. There was cork insulation round the pipes and the heat of the acetylene torch, acting on the cork, started a fire which was detected at about 11.30 p.m. The fire spread, in spite of efforts to extinguish it, and at about 5.30 a.m. on Saturday, February 7, the master was forced to order the scuttling of the ship which resulted in the loss, *inter alia*, of the appellants' cargo. The trial judge found, and it was admitted before the Board, that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire and the man operating the torch should have been warned, or some other method used. The fire was due to the heat generated by the acetylene torch. The respondents relied on the immunities under article IV, rule 1 and rule 2 (*a*) and (*b*). They further submitted that they had performed their obligations under article III, rule 1. The appellants contended that the respondents had not exercised due diligence to make the ship seaworthy within article III, rule 1; that the unseaworthiness so resulting caused the damage; and that in those circumstances the respondents could not rely on the immunities under article IV. The question for decision on this appeal was whether the qualified obligation under article III, rule 1, applied only at stages, or was a continuing obligation from at any rate the beginning of the loading down to the beginning of the voyage.

The Board concluded that the failure to exercise due diligence by the officer was, if the matter became relevant, a failure to exercise due diligence by the carrier within article III, rule 1; that from the time when the ship caught fire she was unseaworthy; and that that unseaworthiness caused the damage to and loss of the appellants' goods. Logically the first submission on behalf of the respondents was that in cases of fire article III never came into operation even though the fire made the ship unseaworthy. All fires and all damage fell to be dealt with under article IV (2) (*b*). If that were right, there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed. But in the Board's opinion the point failed. Article III, rule 1, was an overriding obligation. If it was not fulfilled, and the non-fulfilment caused the damage, the immunities of article IV could not be relied on. That was the natural construction apart from the opening words of article III, rule 2. The fact that that rule was made subject to the provisions of article IV, and article III, rule 1, was not so conditioned, made the point clear beyond argument.

The respondents' further submissions were based, as they had to be, on the construction of article III, rule 1. It was contended that by that article the obligation was only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage. It was difficult to believe that that construction of the word " before " could have been argued but for the fact that that doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law. It was, therefore, worth bearing in mind the words of Lord Macmillan in *Stag Line* v. *Foscolo Mango & Co.* ([1932] A.C. 328, at p. 350) with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague rules, as did the present Act: " It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation." In their Lordships' opinion " before and at the beginning of the voyage " meant the period from at least the beginning of the loading until the vessel started on her voyage. The word " before " could not, in their opinion, be read as meaning " at the beginning of the loading." If that had been intended it would have been said. The question when precisely the period began did not arise in the present case, hence the insertion of the words " at least."

On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result, the ship became unseaworthy and that unseaworthiness caused the damage to and loss of the appellants' goods. The appeal would accordingly be allowed and judgment entered for the appellants for $2,801.33.

CONTRACT: Exemption clause: Construction.

Sze Hai Tong Bank, Ltd. v. *Rambler Cycle Co., Ltd.* ([1959] 3 W.L.R. 214) was an appeal from a judgment of the Court of Appeal of the Colony of Singapore affirming a judgment of the High Court of Singapore. A company, who were customers in Singapore of the respondents, ordered from them bicycle parts to the value of nearly £3,000. Payment was to be ninety days, documents against payment. The goods were shipped to Singapore and the steamship company (the carriers) issued a bill of lading. The respondents drew a bill of exchange on the customers for the amount due, payable ninety days after acceptance. They also made out an invoice for the goods. They took all those documents, as well as a certificate of insurance of the goods, to the Bank of China in London, who passed them on to their branch in Singapore. That branch was to hold them until the bill of exchange was paid, and also any charges. Clause 2 of the bill of lading provided: "(*c*) . . . the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods shall be deemed . . . to cease absolutely after they are discharged" from the ship. On the authority of the carriers' agents in Singapore the goods were discharged from the ship and placed in go-downs of the Singapore Harbour Board, and those agents also notified the customers of the arrival of the goods. The customers wished to obtain possession of the goods, but did not want to pay for them at that time. So they went to their own bank, the appellants, and got that bank to sign a form of indemnity in favour of the carriers agreeing that, if the goods were released to the customers, they would indemnify the carriers against any loss thereby occasioned. The customers and the appellant bank both signed the indemnity. The carriers' agents, on receiving the indemnity, authorised the Harbour Board to deliver the goods to the customers. The agents never saw the bill of lading, which was still with the Bank of China who would not deliver it except against payment. The customers removed the goods from the Harbour Board's premises; they did not pay for them, nor did they pay the draft. The respondents assumed that the goods had remained in warehouse at Singapore and extended the period of insurance. When they later discovered what had happened they brought an action against the carriers claiming damages for breach of contract or for conversion. The carriers brought in the customers and the appellant bank as third parties, claiming to be indemnified by them. Judgment was given for the respondents against the carriers and a declaration made that the carriers were entitled to be indemnified by the third parties. The carriers did not appeal, but the bank did. The Court of Appeal of Singapore dismissed the appeal. The contest before the Board was solely whether judgment had properly been entered against the carriers; for if it was the appellant bank recognised that they were bound to indemnify the carriers.

The representative of the carriers' agents said in evidence that they were supposed to deliver on the bill of lading being produced to them; that when they did not have it produced they covered themselves by getting an indemnity because they were doing something which they knew they should not do, but that it was common practice, an everyday occurrence; and that they relied on the bank's guarantee.

A shipowner who delivered without the production of a bill of lading did so at his peril. The bill of lading in this case was "unto order or his or their assigns." The carriers did not deliver the goods to any such person. The carriers were therefore liable for breach of contract unless some term in the bill of lading protected them. The goods were delivered, without the protection of the bill of lading, to a person not entitled to receive them. The carriers were therefore liable in conversion unless likewise so protected.

The appellants contended that the carriers were protected by clause 2 of the bill of lading (referred to above). The exemption on the face of it could hardly be more comprehensive. If on its true construction the clause absolved the carriers from the act of which the respondents complained, it seemed that by parity of reasoning the carriers would have been absorbed if they had given the goods away to some passer-by, or had burnt them or thrown them into the sea. Had it been suggested to the parties that the condition exempted the carriers in such a case they would both have said: "Of course not." There was, therefore, an implied limitation on the clause which cut down its extreme width. As a matter of construction the Board declined to attribute to it the unreasonable effects contended for. The contract had as one of its main objects the proper delivery of the goods by the carriers " unto order or his or their assigns." The exemption clause must be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. It must at least be modified so as not to permit the carriers deliberately to disregard their obligations as to delivery. For that was what happened. The carriers' agents in Singapore acknowledged: " We are doing something we know we should not do." Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the carriers themselves. The agents were so placed that their state of mind could properly be regarded as the state of mind of the carriers themselves. And they deliberately disregarded one of the prime obligations of the contract. No court could allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause. The appeal would accordingly be dismissed.

Glyn v. *Margetson & Co.* ([1893] A.C. 351, at p. 357); *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama* ([1957] A.C. 149, at p. 164); and *The Cap Palos* ([1921] P. 458, at p. 471) applied. *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co., Ltd.* ([1909] A.C. 369) distinguished.

BREACH OF PROMISE ACTION: Statutory requirement of promise in writing.

Cyril Vernal Udalagama v. *Iranganie Boange* ([1959] 3 W.L.R. 383) was an appeal from a decision of the Supreme Court of Ceylon reversing a judgment of the District Court at Kegalle which had dismissed an action which the present respondent had brought against the appellant claiming Rs.20,000 as damages for breach of promise to marry. Family arrangements in respect of a proposed " arranged marriage " of the parties fell through because the respondent's dowry of Rs.5,000 and five acres of tea was not forthcoming, and the main question in this appeal was whether there was an independent promise " in writing " as required by the proviso to section 19 (3) of the Marriages

(General) Ordinance of Ceylon (c. 95 of the Legislative Enactments of 1938): "... no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing." The respondent contended that such promise was contained in letters which passed between her and the appellant in December, 1950.

The Board stated that a good deal of oral evidence, conflicting on many points, and some documentary evidence was placed before the trial judge, who held that no written or oral promise to marry was established on the evidence before him. The greater part of the evidence related to whether there was an oral promise to marry. That evidence was immaterial to a decision of the case and should have been excluded. The Supreme Court held that, by the earlier decisions of that court, an "action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage." It held that the necessary elements existed, and, setting aside the order of the District Judge, entered judgment for the respondent. The question was whether that ruling was correct.

In Ceylon an action did not lie for every breach of promise to marry. The Board was of opinion that the policy of the legislature in passing the ordinance had been to limit the cases in which an action could be brought to those in which the promise itself was in writing. It might be contained in one or more documents. Documentary evidence which did not in express or other unequivocal terms contain a promise to marry was insufficient even though it might afford evidence of an oral promise to marry. Some confusion seemed to have arisen with regard to the meaning of such words as "evidenced in writing" and "confirmation." The distinction always to be borne in mind was between writing which contained the promise to marry and writing which might afford corroboration of a previous oral promise. The latter, which was sometimes described as writing "which evidences a previous oral promise" was insufficient to support an action for breach of promise. The writing required to satisfy the ordinance must contain an express promise to marry or confirm a previous oral promise to marry, that was, admit the making of the promise and evince continuing willingness to be bound by it. Extrinsic evidence was admissible only where such evidence was permissible on general grounds, for example, where the surrounding circumstances might explain some ambiguity or identify some person referred to in the writing.

Neither of the courts in Ceylon had been able to find in the correspondence referred to a promise to marry. The Board were in the same position. The letters, on the construction most favourable to the plaintiff, did no more than assume that a marriage would take place as the result of an oral promise. Whether such promise was conditional or unconditional, and, if the former, whether the condition was ever fulfilled, was not stated. Extrinsic evidence being inadmissible to supply the deficiencies in the correspondence, the action necessarily failed. The appeal was allowed.

Jayesinhe v. *Perera* ((1903) 9 N.L.R. 62) overruled.

MURDER CHARGE TRIED WITH ASSESSORS: Provocation: Misdirection.

Bharat v. *The Queen* ([1959] 3 W.L.R. 406) was an appeal from an order of the Court of Appeal of Fiji dismissing the appellant's appeal against his conviction on October 18, 1958, in the Supreme Court of Fiji (the trial judge, sitting with five assessors) on a charge of murder. The Court of Appeal was composed of two judges who had been specially appointed to hear the appeal, and who came from New Zealand. After hearing argument they reserved their decision and returned to New Zealand. They afterwards sent their written opinions to the registrar of the Court of Appeal and he read them in open court. One judge was for allowing the appeal and the other for dismissing it. In the result the appeal was dismissed. It was submitted on appeal to the Board that the dismissal of the appeal by the Court of Appeal was bad in law because it had not been pronounced by the senior judge or indeed any judge who had been present at the appeal, as required by section 30 of the Court of Appeal Ordinance of Fiji. The Board stated that they were inclined to agree with that contention, but were disinclined to enter into the matter too closely because it had nothing to do with the merits of the case. It could be corrected quite readily by having the dismissal properly pronounced and the case then brought back again before the Board. The Board had therefore proceeded to hear the argument on the other points. At the trial the appellant had given evidence which clearly raised two issues for consideration: first, self-defence, secondly, provocation. He was cross-examined on his evidence. In summing up the judge discussed at large the issue of self-defence. He then mentioned the issue whether there was provocation such as to reduce the offence from murder to manslaughter. Unfortunately he directed the assessors wrongly on that point. He said: " It has been suggested that you might think the accused guilty of manslaughter. Before you could be justified in thinking that you would have to come to the conclusion that the accused's story in that particular respect is true. You have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that the accused received such provocation that he was justified in resisting force by using force. I think you might find it difficult to believe that such was the case." The Crown conceded that that direction was erroneous in point of law. It wrongly put the burden of proof on the accused, and it gave a wrong description of what amounted to provocation in law.

After the summing-up each of the assessors gave his opinion that the appellant was guilty of murder. The judge, in a reasoned judgment, came to the same conclusion, and dealt fully with the question of self-defence, rejecting it. But he did not mention the question of provocation.

The judge was not bound to conform to the opinions of the assessors, but he must at least take them into account. If the assessors had been misdirected on a vital point their opinions were vitiated. Suppose that the assessors had been properly directed, was it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate, he could hardly have rejected it without saying why he did so. He had, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given, and thus in turn disabled himself from taking their opinions into account as he should have done. That was a fatal flaw.

The appeal was accordingly allowed, the order below set aside, and the case remitted to the Court of Appeal of Fiji with the direction that they should quash the conviction of murder and either enter a verdict of manslaughter and pass sentence accordingly, or order a new trial, whichever course they thought proper in the interests of justice in the existing circumstances. For that purpose the Court of Appeal need not be constituted by the same judges as it was before.

CURRENT PERIODICAL LITERATURE

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HUMAN RIGHTS

Five years ago the United States Supreme Court gave judgment in the case of *Brown* v. *Board of Education*, holding that the segregation of white and coloured children in State schools is illegal under the provisions of the Fourteenth Amendment to the United States Constitution, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." Perhaps the most momentous decision of the Supreme Court since the *Dred Scott* case nearly a hundred years previously, it has led to a storm in the South comparable to that which swept the North after the earlier decision. As an act of legal statesmanship, however, it seems possible that *Brown* v. *Board of Education*, and later cases implementing the rule there laid down, will prove to be as successful as the *Dred Scott* judgment was disastrous; for the supporters of segregation in the schools are fighting a rearguard action, if not a losing battle, and perhaps hardly hope to do more than delay its inevitable abolition. If that is so, the Supreme Court, and in general the rule of law, will have gained in prestige as much as the cause of racial discrimination will have lost, segregation in the schools being the key to the whole situation. Full effect will have been given at last to the principle of legal equality between negroes and whites, which was established by the passing of the Thirteenth, Fourteenth and Fifteenth Amendments after the Civil War, although, of course, legal equality and real equality are different things. And this will have been accomplished by the judicature, and not by legislative action, for although Congress was given power to enforce the provisions of the Fourteenth Amendment it lacked the will, or the courage, to do so. The Supreme Court has brought about a revolution; not, however, a sudden or unexpected revolution, since for a number of years before 1954 it was moving in this direction. In 1896 it held in *Plessy* v. *Ferguson* that compulsory segregation was not a denial of equal protection if the educational facilities provided were equal though separate. But from 1938 onwards this decision was gradually undermined until it was finally overruled by *Brown* v. *Board of Education.*[1]

In view of the political importance of the Supreme Court and the lower federal courts in the American scheme of government, it is natural that their decisions should often be denounced, and even violently denounced. Controversy raged in the thirties over the Supreme Court's refusal to allow the federal government freedom to pursue economic and social policies that were in conflict with *laissez-faire* ideas. This attitude has for some time been abandoned by the court, which now sets practically no limit to federal competence in these matters. During the last twenty years or so questions of human rights and liberties have come to occupy the centre of the picture. Criticism has not been voiced only by those who want to preserve racial discrimination in the schools and elsewhere. Decisions concerning action taken against government employees on grounds of security and for the control of subversive activities have also been condemned.[2]

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[1] "The American Justiciary and Racial Segregation," by Professor A. E. Sutherland (1957) 20 M.L.R. 201.

In other countries, as in the United States, there has been a tendency of recent years to lay emphasis on the protection of individual rights. We have had the reports of the Donoughmore and Franks Committees, the Crown Proceedings Act, 1947, and the Tribunals and Inquiries Act, 1958, in this country. A number of modern constitutions, for example, those of Ireland and India, contain guarantees of rights and provide for judicial review of legislation on the American model as a sanction. It was to this end that the courts in South Africa asserted the right of reviewing legislative proceedings which attempted to override the entrenched clauses of the South Africa Act. Sometimes, as in the cases of the Crown Proceedings Act, 1947, and the Tribunals and Inquiries Act, 1958, the initiative in strengthening individual rights against the government has been taken, in an admirable spirit of abnegation, by the government itself. An instance of the same spirit, on a more generous scale, is afforded in a government Bill for the Recognition and Protection of Human Rights and Fundamental Freedoms which is at present before the Canadian Parliament. The whole issue of the *Canadian Bar Review* for March 1959 is taken up with a discussion of this Bill, which, it seems, is regarded by Canadian lawyers with very great interest and very mixed feelings.

As many people probably in the abstract are in favour of protecting human rights as are against sin. Difficulties arise when it comes to stating precisely what human rights amount to and by what means they can be effectively protected. Thus some of those who contribute to this number of the *Canadian Bar Review* maintain that the passing of such a measure as is contemplated would be useless in practice, or worse than useless. Private rights are already amply protected in Canada by the common law. To attempt to codify and crystallise the common law rules in a number of vague and high-sounding generalisations would be unhelpful, and even a retrograde step since further development of them as they have been developed up to now by the courts would be arrested. We can easily sympathise with this view, for in this country we usually think that the rights, for instance, of personal security and freedom of speech are at least as well protected as they are in countries where these rights are explicitly laid down and guaranteed by the constitution. Even those who are in favour of the proposed Canadian statute recognise that a general affirmation of individual rights cannot be a substitute for established common law procedures and rules. All it can do is supplement them by giving authoritative expression to basic legal principles and setting standards for the guidance of legislators, judges and society as a whole.

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[2] "Storm over the American Supreme Court," by Professor P. A. Freund (1958) 21 M.L.R. 345.

The important clauses of the Canadian Bill are set out in Part I, which is to be cited as the *Canadian Bill of Rights*. Section 2 provides that " It is hereby recognised and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely, (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; (*b*) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex; (*c*) freedom of religion; (*d*) freedom of speech; (*e*) freedom of assembly and association; and (*f*) freedom of the press." Section 3 lays down that " all Acts of the Parliament of Canada enacted before or after the commencement of this Part " and all laws in force in Canada in so far as the Parliament of Canada has jurisdiction " shall be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms, recognised by this Part." The same section contains a further list of more specific guarantees, for example, that no Act, etc., is to be construed or applied so as to deprive a person of his right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. Section 4 requires the Minister of Justice to examine every bill or proposed regulation to ensure that the purposes and provisions of this Part are fully carried out.

Apart from section 2, which is declaratory merely, though apparently wider in ambit, the proposed Act applies to federal laws alone, and not to those of the provinces. It is possible, however, that its effect may extend to subjects reserved to the provincial sphere and outside the competence of the federal government under the British North America Act, or claimed to be outside it by supporters of provincial autonomy. This is the most controversial feature of the Bill. On the one hand, criticism is directed against the failure, perhaps not wholly unintentional, of the Bill to make clear whether or not provincial legislation that infringes the rights and freedoms protected is to be overridden. On the other hand, strong opposition to the terms of the Bill is expressed by those who fear increased centralisation. " Section 2 is the cardinal provision of the Bill," writes a Quebec contributor. " If it means what it says, it amounts to an attempted definition of the permissible limits of legislative and executive action in Canada. It is true that no reference is made to the provincial legislatures and governments. However, it is obvious that the rights and freedoms intended to be defined lie largely within their field of jurisdiction. Thus it is impossible to give full effect to the proposed recognition and declaration of human rights without treading upon provincial jurisdiction. This would clearly be *ultra vires*." It may be, he remarks, that there ought to be a constitutional limitation of the powers of both federal and provincial parliaments with regard to fundamental rights, as in the United States. What he finds objectionable is that the Parliament of Canada should attempt to restrict the powers of the provinces while its own powers remain uncontrolled. The projected statute will be an ordinary Act of the Canadian Parliament, subject to future repeal or amendment like any other Act. It cannot be otherwise unless the guarantees of individual rights are written into the British North America Act, for the Canadian Parliament can no more tie its own hands, whatever the Bill may state, than the British Parliament. The Canadian Government, however, has no intention of seeking an amendment of the British North America Act, which in any case would be impracticable, since the Act cannot be amended in Canada and the Parliament at Westminster would not take action in the face of opposition by the Canadian provinces.

That these fears may be well-founded is shown by the experience of the United States, where general guarantees similar to those contained in the Canadian Bill have resulted in extensive restrictions imposed by judicial decision in the federal courts on federal and state legislation. There is no need to be surprised that state legislation has been frequently, and federal legislation comparatively seldom, struck down. Similar provisions might be interpreted in a similar manner by the Canadian Supreme Court, which now that it is no longer subordinate to the Privy Council is free to develop its own ideas of constitutional interpretation. On three occasions already it has discussed the question of the validity of provincial legislation infringing fundamental freedoms. In the first of these cases an Alberta statute which imposed certain requirements on the publication of news by the press was held in 1938 to be *ultra vires.* Duff C.J. observed that the provinces were not entitled to legislate in such a way as to curtail the exercise of the right of public discussion and thus interfere with the working of the parliamentary institutions of Canada. In two Quebec cases in 1953 and 1957 members of the court expressed the opinion that the provinces had no authority to pass legislation adversely affecting freedom of religion or speech or of the press.

The argument used by Duff C.J. in the *Alberta Press Law* case, it has been pointed out, might equally well be directed against federal legislation which interfered with the working of parliamentary institutions. There is at any rate a possibility that this line of thought may be carried further by the Supreme Court. The enactment of the Canadian Bill of Rights could no doubt assist it to do so if it felt so moved, even although an Act of the Canadian Parliament could not be directly invalidated on the ground that it was inconsistent with the Bill of Rights. The provisions of section 2 might indeed be read as an invitation to the courts to take a strong line in the future in defence of individual rights. The opening words of section 3 seem to be designed to make it as difficult as possible in practice for future legislation to limit these rights. Subsequent Parliaments will naturally not find it popular or easy to pass legislation expressly, or by necessary implication, inconsistent with the Bill of Rights. In the absence of such legislation the courts will not only be free but bound to test every earlier or later statute in the light of the general provisions of the Bill of Rights. The consequences may, or may not, be far-reaching according to the attitude of the Canadian courts.

The American example hardly supports the view that constitutional provision for the protection of human rights is useless or superfluous. It is in fact in the course of its interpretation of those articles of the Constitution that the United States Supreme Court has made some of its most important decisions, including those in the *School Segregation* cases. Phrases like " due process of law " and " equal protection of the laws," Professor Freund says,[3] are " open-ended." They have " a hard core of historical meaning, but are not to be delimited by that historical experience." Their meaning therefore is to be gleaned from their " origin and line of growth." In other words, they mean what the Supreme Court has decided they should mean, and the Supreme Court at one period may hold a different opinion from the Supreme Court at another period. To suggest, however, a biological analogy to explain the history of judicial interpretation of the United States Constitution is, perhaps, misleading, in that it implies more regularity and inevitability than there has been and does not allow enough for the arbitrary character of the decisions of the Supreme Court. Who could have foreseen that the provision in the Fifth and Fourteenth Amendments against any person being deprived of life, liberty or property without due process of law would be so construed as to render invalid a New York law forbidding employees in a bakery working more than sixty hours in a week, or another statute authorising a board to fix minimum wages for women in any occupation in the District of Columbia? Of course, American judges are not uninfluenced by the progress of ideas and the pressure of public opinion. It was easy enough to prophesy that in the twentieth century decisions of this kind would not stand indefinitely. But the complete and, sometimes, sudden reversal of them has been as unpredictable as the decisions were themselves. Professor Freund admits that the outcome of the *School Segregation* cases was by no means a matter of course. The Supreme Court might have refused to depart from its old separate-but-equal standard, or again it might have treated the issue as one to be decided by Congress under its specific power to legislate in order to carry out the provisions of the Fourteenth Amendment.

Most people who are free from racial prejudice could presumably agree in approving of the *School Segregation* decisions. It required boldness to make them, for the risks were obvious, and the unpopularity which the court incurred in the South was, and still is, severe. But fear of unpopularity has never been a failing of this august court, which is not merely independent of the executive, as our courts are, but on an equal footing with the legislature, and whose judgments, so difficult is the process of constitutional amendment, can normally be overruled only by itself. It is a mistake to think that the court is a court of law at all in the sense familiar to us when it is acting as constitutional arbiter. The process of interpreting an Act of Parliament is a totally different thing from the process of interpreting a constitution, as this is practised by American courts. The duty of a court of law in " interpreting " a statute is, as we understand it, to carry out the intentions of Parliament. But the real function of the Supreme Court, when by a polite fiction it " interprets " the United States Constitution, is to decide, more or less at its discretion, what policies the federal and state legislatures should be allowed to pursue and what policies they should not be, a function which is plainly political rather than legal. The true nature of the function is shown almost as much by the court's readiness to reverse its own judgments as by the judgments themselves, and cannot be illustrated more aptly than by pointing to its decision at one time that the States might maintain separate schools for negroes and whites, and at another time that they might not.

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[3] *Loc. cit.*, p. 350.

Resistance to the Supreme Court, Professor Freund relates, has been a persistent strain in American life from the start. The story began as early as 1793, when the court entertained a suit against the State of Georgia, giving judgment for the complainants, with the result that the Georgia House of Representatives passed a Bill declaring that any federal marshal who should attempt to enforce the judgment should suffer death by hanging without the benefit of clergy. This was one of the rare instances when the Supreme Court was overruled by constitutional amendment, with consequences well known afterwards to British investors in state bonds. What is novel, and very significant, in the last twenty or thirty years, is that while formerly it was liberal opinion which the court was accustomed to outrage, opposition nowadays comes from those of contrary opinions or sentiments. Thus the refusal of the court to admit the validity of legislation in favour of minimum wages for women, until it changed its mind in 1937, probably in part under the pressure of President Roosevelt's attempt to pack the Supreme Court, was ostensibly a defence of the freedom of employers against legislative interference. As such it would have pleased the Benthamite radicals of a hundred years earlier. But to radicals of a later age, and indeed to all but extreme conservatives, it seemed a denial of the human rights of employees to be protected from economic exploitation.

The rights, or claims, of the individual until the latter part of the nineteenth century were everywhere looked on as rights to be asserted against the state. The best government was considered to be that which governed least and allowed individuals almost complete freedom of action, a doctrine which governments themselves, especially in the Anglo-Saxon countries, came by gradual steps to accept. But no sooner was *laissez-faire* set up as a dogma than the first symptoms of its decline appeared. The discovery began to be made that instead of a tyrant the state might be turned into a servant and might help to secure economic and social rights for the individual. Legislation might enable the interests of the many to be placed before those of the hitherto privileged minority, and the engine of taxation might force the wealthy to contribute to the welfare of the needy. Collectivism, indeed, and the great increase in the power of government which accompanied it was not the outcome of democracy. As Dicey observed in his *Law and Public Opinion in England*[4] it preceded democracy, which he thought was only one, and not the most important, cause of the decline of *laissez-faire*. It would be truer to say that collectivism and democracy advanced independently during the nineteenth century, though the progress of each tended to strengthen the other. The foundations of the Welfare State, which is at the same time collectivist and democratic, were laid by Whig and Tory governments in the 1830s and 1840s, a generation before democracy was established in Britain and the collectivist ideology became widespread. When democracy arrived in power it found the collectivist state half constructed and thus the means of extending social and economic benefits to the many already at hand. It was only necessary to continue an existing process further. Just as the landed aristocracy had had to recognise the ascendancy of the middle class in the early part of the nineteenth century, so the middle class in its turn was obliged to give way before the demands of the masses, who were now in control of the state and in a position to make their interests prevail.

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[4] 2nd ed., pp. 217 *et seq.*

As long as equality of rights remained to be achieved, the growing power of the state seemed an advantage to individuals, except for the minority whose privileges were being diminished or abolished.

The majority were still, though politically predominant, in an inferior position otherwise. Thus the idea that individual rights might need to be protected against the state was dismissed as old-fashioned. *The New Despotism*, for example, the book in which Lord Hewart attacked delegated legislation and administrative justice, was considered as a reactionary attempt to obstruct progressive social policies, or at any rate as unnecessarily alarmist. It was only when the Welfare State was established, during the decade 1940 to 1950, that the economic and social claims of the masses were, if not satisfied, at least substantially conceded, so far as is possible without a greater degree of real equality than appears perhaps practicable or desirable at present. In these circumstances the maintenance of existing rights tends to be regarded as of more importance than the acquisition of new rights. The state, first an enemy then an ally, becomes an object of suspicion and resentment. For, if political power falls into the wrong hands, it can take away again those rights which have been obtained in the past. Moreover, its laws and regulations, increasingly numerous and restrictive, become more and more liable to irritate and offend.

There is no reason for supposing that human beings in general have much appetite for democracy as such. The first movements towards it were made in the modern world by those who aimed at freedom of thought and religion, and relief from the oppression of arbitrary government, and after that other liberties and rights. They imagined that when political power was in the hands of the people, and not of monarchs, or hereditary ruling classes, or employers and capitalists, there could be nothing left to endanger individual rights. It was only necessary for democratic institutions to be experienced for doubts to arise of the soundness of this view, doubts which became more acute with the appearance in a number of countries of totalitarian governments, founded indeed usually on fraud and violence, yet often enjoying wide popular support and at least acquiesced in by the great majority. Democracy is held to be the antithesis of totalitarianism. But democracy in the proper sense is simply the rule of the majority, and may be totalitarian as well as liberal or socialist. The fallacy of believing that the interests of the many are identified with the interests of the majority was pointed out long ago by John Stuart Mill and Tocqueville, without much attention being paid to their warnings. What really distinguishes the countries of the West from those on the other side of the Iron Curtain is not democracy but the rule of law and guarantees of individual rights, characteristics which do not always coincide with a democratic form of government and compared to which it is of superficial importance which form of government is adopted. It is true that the extension of individual rights since the American and French Revolutions has been assisted by, and depended largely on, the rise of democratic institutions. It does not follow that in order to maintain them majority rule must continue. On the contrary, it may be found that they cannot survive except under another form of government, or at least unless the power of the majority is drastically curtailed. It is quite probable that the democratic ideology having fulfilled its function of spreading and widening respect for the rights of individuals, is already on the decline, and that this might be evident, or more evident, if it were not for the association of ideas between majority rule and the values of Western civilisation.

The drift of contemporary opinion towards the protection of human rights, and the revival of ideas of fundamental, or natural, law may be seen as symptoms of a declining belief in democracy. The course of affairs since the opening of the present century has no doubt also had the effect of creating a desire for stable and certain standards in a world where reason and justice appear to be at the mercy of events. These qualities of stability and certainty, essential to the rule of law, are not easily attained where government is in the hands of a popular majority, and it is questionable whether in the long run the rule of law is compatible with the rule of the majority. It is hardly possible for us, even if we wished, to imitate the remarkable American method of restraining majority rule by judicial review of legislation. Nor is it to be expected that Parliament here will enact another and up-to-date Bill of Rights, like that which is now before the Parliament at Ottawa. On the other hand, while remaining unlimited in theory, Parliament may perhaps find that its powers are more and more restricted in practice.

Every new right that is conferred by law results in a vested interest which it is increasingly difficult as time goes on to disturb. For this reason certain rights, like the right to personal freedom, or the freedom of the press, have been so long established that they have become, so to speak, natural rights in this country, and seem to us as secure, or rather more secure, than any constitutional guarantee could make them, although as a matter of positive law they are precarious or even strictly non-existent.

Are not a number of more recently acquired rights, for example, those of every person to education and medical treatment, similarly in process of turning into natural rights, the abrogation of which will soon, if it is not now, be equally out of the question as a matter of practical politics? By this means, if carried far enough, and by the development of some other existing tendencies to reduce the scope of political action, it is conceivable that the function of the legislature might one day be confined within a very narrow field. The rule of law might be extended and enhanced to such an extent that the rule of the majority would become of little actual importance. The powers of Parliament might continue outwardly the same, while its majesty, like that of the monarchy before it, was only symbolic. But it is unwise to be too optimistic.

TAXATION AND CAPITAL RECEIPTS

Now that the English, by a majority, and the Scottish Law Reform Committees have approved of the rule established by *British Transport Commission* v. *Gourley*,[1] it is plain that there is no prospect of legislation to alter the existing law, that tax liability is to be taken into account in making an award for damages. But this does not mean that the principle laid down in *Gourley's* case is accepted by everyone as sound, or that the question has been finally settled. Both Committees considered that the implications of the case should be reviewed after a lapse of time, seeing that unforeseen difficulties might be found to arise in practice. It may be observed that the Committees held different views about the type of practical difficulty that might emerge. The English Committee thought that the question whether the damages awarded would be held to be taxable (in which case the decision in *British Transport Commission* v. *Gourley* has no application) was not likely to present difficulty, but that the task of assessing the plaintiff's tax liability, in order to determine the amount of the damages due to him, might sometimes involve much labour and expense. The Scottish Committee took the opposite view, namely, that the most serious problem was the uncertainty whether or not, in a particular case, the damages awarded would attract tax in the recipient's hands. If it turned out later that they did, an award of damages which was reduced because of an estimate of the future tax liability of the recipient would, of course, be grossly inequitable. On the other hand, the Scottish Committee were of opinion that the other practical difficulty suggested, in particular the impracticability of calculating precisely in advance the hypothetical tax liability to be taken account of, could probably be resolved if the tax element in damages were assessed in a broad way.

The Scottish report compares favourably with the English both in its unanimity and in the constructive suggestion contained in it, that there should be some provision for making the Crown be a party to actions of damages where tax liability arises, so as to avoid the possibility of a net award of damages being followed by a decision that these damages are taxable, in a question between the subject and the Inland Revenue.

Whether or not serious practical difficulties arise from *Gourley's* case, it can hardly be said that the rule now established, and approved by both English and Scottish Committees, is more than a choice of the lesser evil. Most people may agree that it is better that an award of damages for loss of prospective earnings should be a net sum, allowing for the tax that would have been levied on those earnings, rather than a gross sum, excluding the tax element. Otherwise the award, in cases where the earnings are large, may be out of all proportion to the real loss sustained by the injured person. On the other hand, a net award may not only result in the wrongdoer getting off much more cheaply than he deserves, at the expense of taxpayers in general, but must also considerably increase the already arbitrary and uncertain character of an award of damages. Any estimate of future earnings or profits is in some degree a matter of guesswork. Far more so if it is necessary to have regard to future variations in tax and to all the possibilities open to a particular taxpayer of shifting the burden from his shoulders.

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[1] [1956] A.C. 185.

Three members of the English Committee considered that the only way to achieve a result fair to the plaintiff, the defendant and the Crown is for damages to be awarded gross, but to be taxable in the recipient's hands. Mr. J. A. Jolowicz, writing in the *Cambridge Law Journal* for April 1959, comes to the same conclusion, and argues that the law based on *Gourley's* case involves the paradox of treating the same payment as both capital and income at the same time. The damages are treated as capital and so not liable to tax. Yet they represent future income that would have been subject to tax, had it been earned. In order to avoid the consequences of assessing the whole amount of the damages to tax at once, the suggestion has been made, and is approved by Professor T. B. Smith in a note appended to the report of the Scottish Committee, that damages might be awarded gross and then paid into court to be applied to the purchase of an annuity subject to special fiscal provisions. The other members of the Scottish Committee thought that this was a matter of tax policy on which they ought to offer no opinion, while the six remaining members of the English Committee condemned the proposal that damages should be taxable, on the ground that it would be contrary to the fundamental principle of our income tax code, that capital sums are not taxed.

It is true that an *ad hoc* solution of the problems raised by *Gourley's* case by means of special tax provisions applicable to such awards of damages would create another anomaly in the income tax code, which contains only too many already. What perhaps ought rather to be pondered is this fundamental principle itself. *British Transport Commission* v. *Gourley*, indeed, is just one more illustration of the difficulties involved in distinguishing receipts which are of the nature of income, and therefore taxable, from receipts which are of the nature of capital, and so not taxable. It is all very well to say that the distinction is fundamental—that is only another way of saying it is traditional. In fact, as has been pointed out more than once, no precise line has ever been, or can be, drawn between "capital" and "income."

In an article in the *British Tax Review* for April 1959, Mr. W. Phillips comments amusingly on the inconsistencies of this branch of law. An employer, for example, who buys a life annuity for an employee the day after he retires may charge the amount against untaxed profits. But if at the same time he writes out another cheque for another employee, who is due to retire the following day, this is no longer revenue but capital expenditure and must come out of untaxed profits.[2] Again, "during a particular fiscal year, Smith receives £900 in wages and a cheque for £10 at Christmas. This gift is almost certainly taxable income; too big to rank as a luncheon voucher, and too small to be regarded as a capital gift. Had it been £50,000 worth of shares, and had the employer made the gift in memory of his father, Smith's late employer, it would not have been assessable to income tax."[3]

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[2] *Hancock* v. *General Reversionary and Investments Co., Ltd.* [1919] 1 K.B. 25; *British Insulated and Helsby Cables, Ltd.* v. *Atherton* [1926] A.C. 205.

One may make a profit out of a stock exchange transaction without any fear of losing part of the gain to the Inland Revenue. It is different if one speculates in commodities, like whisky or toilet paper, even if it is an isolated venture, quite out of the track of one's usual business.[4] On the other hand, a speculator in houses may escape tax, provided he does not make too much of a habit of it.[5] The reason given is that land or houses, or stocks and shares, are at least a potential source of revenue, although[6] no actual revenue is derived from them, whereas commodities have not in general this character. Moreover, ownership of land may be said to produce a certain pride of possession,[7] while one could not expect to acquire social prestige by owning a million rolls of toilet paper, nor, though this may perhaps be more questionable, could one pride oneself on possessing a far larger quantity of whisky than would be useful to oneself, one's family and one's friends.

The difficulty of deciding whether a sum of money is capital or income is not lessened by the fact that the taxpayer may sometimes have an option into which category it is to fall. Thus, in a case which arose out of a provision for payment of a share of profits to a retiring partner, it was observed that it is open to the parties to such an agreement either to frame it so that the payment is an annual payment; or alternatively, to make it a capital payment, although it may be measured by the fluctuating profits of the business in future years and although it may be payable in instalments.[8] "There is obviously," the Lord President said,[9] "room for nice distinctions in construing an agreement of this sort with a view to determining whether the payment is a capital payment or whether it is really an annual payment."

The skill with which courts have drawn these fine distinctions must be admired, and we have to recognise that the artificial notion of the separation of "capital" from "income" makes them unavoidable. In the mind of the lay taxpayer, however, they may possibly produce both bewilderment and impatience. It is not necessary to know much about the Stock Exchange to realise that many transactions there are purely aimed at capital gains and cannot in any sense be described as commercial investments. And the proposition that, where parties agree to the payment of certain sums annually out of profits, these are to be treated either as annual payments, attracting tax, or as instalments of a capital sum, and so not taxable, at the option of the parties, would surely seem to anyone unacquainted with the law of income tax rather hard to believe.

The differentiation between "capital" and "income" with which we are familiar is so well established in this country that it appears to us to be natural and inevitable. But if we compare British with American revenue practice, we shall see that this is not the case. "Income" is defined by the United States Internal Revenue Code of 1954, as we learn from an interesting and lucid article by Mr. Jacques Barbeau in the *Canadian Bar Journal* for June 1959,[10] in a way which contrasts sharply with the meaning attached to it here. In general, all wealth which flows into the taxpayer's hands, other than a mere return of capital, is treated as his gross income under federal law, including capital gains, gifts and prizes given by television and radio programmes, and even the market value of a found article. Capital gains, however, at least where the asset is held for more than six months, are taxed at a reduced rate, and there is provision for carrying forward capital losses for a number of years and setting them off against gains.

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[3] *Bridges* v. *Hewitt* [1957] 2 All E.R. 281.

[4] *Inland Revenue* v. *Fraser*, 1942 S.C. 493, S.L.T. 280; *Rutledge* v. *Inland Revenue*, 1929 S.C. 379, S.L.T. 296.

[5] *Inland Revenue* v. *Reinhold*, 1953 S.C. 49, S.L.T. 94.

[6] As in *Reinhold's* case.

[7] *Inland Revenue* v. *Fraser, supra*, *per* Lord President Normand, at p. 499.

[8] *Inland Revenue* v. *Hogarth*, 1941 S.C. 1, 1940 S.L.T. 458.

[9] At p. 7.

The fact that we are accustomed to a quite different interpretation of the term "income" is apparently to be explained largely by historical reasons. The legal concept of income was evolved originally by the English and Scottish courts in an attempt to solve the problems arising from the entailment of estates by landowners. Under a bequest of lands to a specific line of heirs the beneficiary received only the use and enjoyment of the fruits of the estate during his lifetime. His right being so restricted, he could not in any circumstances encroach upon the *corpus* of the estate, and a rigid distinction was therefore set up between the harvest, or produce, upon the one hand, and the physical entity, or capital asset, upon the other hand. When in course of time commercial securities came to be of equal importance with landed property, the courts applied the same standard. The security was considered as a physical entity, and the interest on it as the produce, this recurring source of income being distinguished from sporadic or casual increases in the value of the investment, which were regarded as additions to capital. Consequently from the time when income tax in its present form was instituted, only receipts of the nature of, or analogous to, rent, interest and dividends have been held to be taxable, other receipts, such as capital gains, gifts or legacies, etc., being treated as accretions to the taxpayer's capital assets.

Entailed property, however, did not exist in the United States, and land was inexpensive and did not confer social prestige. It was bought and sold not so much because it produced a rent or harvest, but because of the profits to be made by dealing in it. It was hardly possible in the circumstances to distinguish between ordinary income and capital gains, since in point of fact ordinary income habitually represented realised profits from the purchase and sale of property. As a result, the term "income" came to be regarded as meaning both recurring yearly profits and also what in this country were thought of as accretions to capital. Thus, when in 1864 a new Income Tax Act was enacted by Congress, it specifically declared that gains and losses realised from the sale of property in the preceding year should be taken into account in computing taxable income.

The question whether capital gains should be made subject to tax here, as in the United States, has become a controversial, and recently a political, issue. A majority of the Royal Commission on the Taxation of Profits and Income in their Final Report (1955) recommended against the taxation of capital gains, mainly on the ground of the practical disadvantages involved. If, however, the general principle that all receipts were liable to tax came to be accepted, capital gains could scarcely be excluded, although there might be some practical difficulties in the way of making them taxable, and perhaps the additional revenue derived from taxing them would be comparatively small, assuming the taxpayer's right to set off his losses against his gains.

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[10] "Tax Treatment of Capital Gains," p. 144.

It may be that the distinction between receipts of the nature of capital and those of the nature of income is too deeply embedded in our law to be altered. Yet it seems inequitable, as well as anomalous, that the former should escape altogether, while the latter are subjected to a steeply progressive tax. In this respect, our law is open to damaging criticism. A, without any merit on his part, receives a gift of £10,000, or wins the same amount in a competition, and keeps the whole of it. B earns a similar sum by hard work, or the exercise of skill, and is relieved of more than half of it by the State. The more prominent the element of luck or speculation, the more likely the recipient is to escape the attentions of the tax collector. We can understand, from a practical point of view, the distinction, though ultimately it may be artificial, between a capital receipt and a revenue receipt, and therefore the desirability of taxing them in different ways. In the case of a gift or prize, for example, a graduated but uniform rate of tax would seem to be more appropriate than a rate varying with the recipient's income. What is impossible to understand is the reason why in the one case there should be a heavy tax and in the other no tax at all.

If, indeed, a distinction is to be made, it might be simpler to draw it between recurrent receipts and casual receipts, rather than between income and capital. But, however the distinction is drawn, means will always be found, if certain receipts are taxable and others are not, by which some persons will be able to escape their due share of taxation. Not only is it unjust that their misdirected ingenuity should be rewarded, but it is wasteful from an economic point of view that so much energy and intellect should be devoted as they now are to the pursuit of tax avoidance. No doubt, unless we are optimistic enough to believe that the level of taxation is going to be reduced to what it was fifty years ago, the game of hide and seek will continue to be played by taxpayers and tax collectors. Tax avoidance, however, flourishes as it does because it is so profitable, and the less handsomely it pays the less luxuriantly it will flourish. Among the favourite methods is to arrange for the taxpayer's income to take the form of capital receipts, or again to arrange for payment of a capital sum, such as a lump sum by way of pension, in lieu of payments which would attract tax in the hands of the recipient. But if tax was payable in either event, it would not be worth while, or at least there would be smaller temptation, to resort to devices of this kind.

The advantages, as the law stands, of making and receiving payments in such a way as not to attract income tax and surtax are so great that the results are far-reaching, and possibly produce a distorting effect on the whole economy of the country. But all this depends to a large extent on the continuing validity of the fundamental principle, or prejudice, which forbids the taxation of so-called capital receipts. Should it be discredited, the advantages to which it gives rise would come to an end, or be seriously diminished. In the meantime, efforts to achieve partial reform, by making capital gains, or the development values of land, or damages for loss of income, taxable are likely to be as unsuccessful as they have been in the past.

SUMMARIES

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AMERICAN LAW

"The Annual Survey of American Law" is given in the *New York University Law Review,* March 1959. In the April number of the same review, there are two articles dealing with racial questions: "A New Way towards Equal Suffrage" by Professor Alfred de Grozia, and "Racial Integration and Academic Freedom" by the Arthur Garfield Hays Memorial Fund, New York University.

"The Credit Card—A New Instrument," appearing in the *Connecticut Bar Journal,* March 1959, is noted because of the resemblance of these cards to documents known in Glasgow warehouses, under the name of "Lines."

Oklahoma Law Review, May 1959: Professor Gilbert Geis on "Cameras in Court."

New York University Law Review, May 1959: Professor W. F. Fratcher on "Presidential Power to Regulate Military Justice."

The Journal of the International Commission of Jurists, Spring 1959: "Legal Aspects of Civil Liberties in the United States" by Mr. Kenneth W. Greenwalt.

The American Bar Association Journal, June 1959: "A new line of Decisions on Labour Law," by Harry Lambeth; July: "Specialised Appellate Council," by Frederick Wiener: August: "Grand Jury Handbooks," by Judge Hartshorne; September: "The Law of Oil and Gas," by H. J. Prendergast of the Texas Bar.

COMMON AND STATUTE LAW

Professor A. L. Goodhart, K.B.E., reasserts his position on "The *Ratio Decidendi* of a Case" in the *Modern Law Review,* March 1959.

In the *Modern Law Review,* May 1959, Professor Kahn-Freund writes on "Matrimonial Property," dealing with the subject from a comparative as well as a social standpoint; and Mr. P. S. Atiyah of Khartoum sets out the law relating to the liability of infants in fraud.

In the *Law Quarterly Review,* April 1959: R. H. Maudsley on "Proprietary Remedies for the Recovery of Money" (citing *Magistrates of Edinburgh* v. *M'Laren* (1881) 8 R.(H.L.) 140); also J. D. Davies on "A Forgotten Chapter in Quasi-Contract."

Dean Horace E. Read of Dalhousie University reviews the "Judicial Process in Common Law Canada" in the *Canadian Bar Review,* May 1959.

COMPARATIVE AND FOREIGN LAW

In the *Modern Law Review*, March 1959, Stephen Schafer, formerly Professor of Criminology at Budapest University, writes an article showing that Hungarian criminal law exhibits no modern features.

In the *British Tax Review*, March 1959: "European Fiscal Systems—Italy." In the April number of the same *Review*, "European Fiscal Systems—Belgium."

"Central Government Control of Municipalities in the Netherlands" is dealt with by Robert L. Morland in the *Western Political Quarterly*, March 1959.

The *Revue Internationale de Droit Comparé*, January–March 1959, has an interesting article, written from a broad point of view, by Professor Réné David of Paris on "Arbitration and Comparative Law." In the same number, Professor Carbonnier of Paris discusses the general question of "Legality in Systems behind the Iron Curtain," while M. Szpunar, Rector of Lodz University, reviews "Liability without Fault" as found in the Polish Code. There also may be read with interest an article on Japanese marriage by Mr. Tanignihi, Doyen of the Law Faculty of Osaka University.

An historical and comparative review of "The Constitutional Question in the West Indies" is contributed by Mr. Ramphal in *Public Law*, Summer 1959.

Revue Internationale de Droit Comparé, April–June 1959: M. F.-E. Klein on the use of the comparative method in decisions of the Swiss Federal Tribunal; Professor Robert Plaisant of Caen on "Inventions by Employees in Comparative Law."

American Bar Association Journal, August 1959: Rita Hauser of the Columbia Bar on "Criminal Law in France."

Revue Internationale de Droit Comparé, July–September 1959: Professor René Rodiere of Paris on "Civil Liability and Atomic Risk"; Professor Viktor Knapp of Prague on the concept of "Personne Morale" in Czechoslovakian law; Professor Eugeniusz Modlinski of Lublin on "Safety of Workpeople in Polish Legislation."

CONFLICT OF LAWS

In the *American Bar Association Journal*, June 1959: Dean Stimson of Idaho on "When does a Court have Jurisdiction?"

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Public Law, Spring 1959, following a practice it has inaugurated, concentrates on topics which have a feature in common, on this occasion, Parliament: The *Strauss* case, by Donald Thomson; the formula to be applied by Boundary Commissions, by James T. Craig; "Upper Chamber Scrutiny of Delegated Legislation," by John E. Kersill.

In the *Modern Law Review*, March 1959, Mr. J. A. G. Griffith of London University waxes slightly cynical about the present position in "Tribunals and Inquiries."

The passing of the Canadian Bill of Rights has moved the *Canadian Bar Review*, March 1959, to devote the whole issue to the position of a Bill of Rights and it would be supererogatory to do more than refer the student to its publication.

Professor Bernard Schwartz details the late Chief Justice Vanderbilt's contribution to administrative law in the April number of the *New York University Law Review.*

In *Public Law*, Summer 1959, Mr. I. M. Pedersen of the Danish Ministry of Justice elucidates an important and topical question on "The Danish Parliamentary Commissioner in Action," while Professor Kersell of Ontario discusses a point connected with grievances arising out of delegated legislation.

The basis for prerogative writs continues to be discussed, and in the *Canadian Bar Review*, May 1959, Dr. D. C. M. Yardley does so as regards certiorari and prohibition.

Modern Law Review, July 1959: Mr. L. Neville Brown on "Reform of French Administrative Courts."

Law Quarterly Review, July 1959: Mr. D. P. O'Connell on "Colonial Extra-Territorial Legislative Incompetence."

New York University Law Review, June 1959, consists of an important symposium on State Responsibility in a Federal System.

Revue Internationale de Droit Comparé, April–June 1959: Professor Paul Basted of Paris on "General Principles of the New French Constitution"; Professor Fukase on the working of the Japanese Constitution of 1946.

Revue Internationale de Droit Comparé, July–September 1959: Mons. René Mankiewicz on "Judicial Interpretation on Provincial Autonomy in Social Law in Canada."

CRIMINAL LAW

An outstanding publication is perhaps the symposium on criminal law which constitutes the twenty-seventh volume, Nos. 1–4, of the *Revista Jurídica de la Universidad de Puerto Rico*, 1957–58, of 450 pages, bilingually in Spanish and English, to celebrate the intended reform of the Criminal Code of Puerto Rico. The articles contain contributions signed by many names of distinguished criminologists in Europe and America, including Herzog (France), Del Vecchio (Italy), Jiménez de Asúa (Spain), Morrow of Louisiana, Glanville Williams, Nuvolone (Italy).

The *Law Quarterly Review*, July 1959: Professor Radzinowicz on "Changing Attitudes towards Crime and Punishment."

ENGLISH AND COMMONWEALTH LAW

The *Modern Law Review*, July 1959: Mr. Gareth A. Jones on "Delegation by Trustees"; Mr. J. A. Andrews on "Common Law Marriage."

Law Quarterly Review, July 1959: Mr. Rupert Cross on "*R.* v. *Sims* in England and the Commonwealth" (query the Moorov doctrine?).

Journal of the International Commission of Jurists, Spring 1959: "The Layman and the Law in England," by Sir Carleton Allen.

Canadian Bar Review, September 1959: "Beneficial Ownership of the Matrimonial Home," by Alan Milner.

INTERNATIONAL LAW

American Journal of International Law, January 1959: Messrs. Myres S. McDougal and Harold D. Lasswell of Yale present a study of " Diverse Systems of Public Order " which is the subject for the meeting of the American society in terms of the impact of " values of human dignity." " Election Procedure in the United Nations " is by Mr. Rudzinski of Columbia. Aspects of international river disputes and international drainage basins are also dealt with by authors practically concerned with their respective subjects.

The April 1959 number of the *American Journal of International Law* starts with an article by Professor Briggs, the editor in chief, re-examining, particularly from the *Interhandel* case angle, what ought to be the United States Declaration regarding the jurisdiction of the International Court of Justice; records the somewhat meagre doings of the Thirty-seventh year of the World Court; has articles on voting on " Important Questions in the United Nations General Assembly," on the machinery for interpretation of such international agreements as that of the International Monetary Fund; and on a draft code for protecting foreign investment and what should be the requisite background.

The *Oxford Lawyer*, Trinity 1959, shows an article on " Fish in the Icelandic Sea," by Gadus Callarias.

American Bar Association Journal, July 1959: Professor Jacobus on " Current Developments in Space Law."

Canadian Bar Review, September 1959: Two articles on the law of international rivers, " Canadian-United States Practice and Theory," by Mr. Jacob Austin, of Columbia, and " The Columbia River Controversy," by Mr. C. B. Bourne, of Columbia University.

American Journal of International Law, July 1959: Mr. Herbert W. Briggs reviewing the latest judgments on *Interhandel*; Mr. Leo Gross on the Geneva Conference on Sea Law as affecting the Gulf of Akaba. The articles from outside sources are: Nasim Hasan Shah of Lahore University College on " The Right of a State to Seize Evidence," criticising British contentions in the *Corfu Channel* case, and Mr. Skubiszewski, of Poznan University, defending the status of Poland's (and other iron-curtain States') alliances in international law.

LAW AND LITERATURE

In the *American Bar Association Journal*, March 1959, Mr. Charlton Ogburn claims to identify Edward de Vere, Earl of Oxford, as the author of the works attributed to Shakespeare from an examination of the legal contents of these.

In the *Oxford Lawyer*, Trinity 1959, Lord Birkett's " Reflections in Retirement " reflect on the need for a lawyer to sustain an interest in letters.

American Bar Association Journal, September 1959: Dorothy and Charlton Ogburn (of the Georgia Bar) continue the debate on " The True Shakespeare."

LAW AND MEDICINE

The *Connecticut Bar Journal*, September 1958, has an article on the approach to post-traumatic psychoneurosis, by Mr. Theodore J. Koskoff, who has specialised in the questions of medical evidence.

LAW AND RELIGION

In an American setting, Dr. Paul Ramsey, Professor of Religion at Princeton University, considers in the *New York University Law Review*, April 1959, the "Legal Imputation of Religion to an Infant in Adoption Proceedings."

LEGAL EDUCATION

The *American Bar Association Journal*, February 1959: The National Conference on Continuing Legal Education, held at New York in December 1958.

The *Canadian Bar Journal*, February 1959: The Association of Canadian Law Teachers' Annual Conference in Alberta in June. The same *Journal*, April 1959: "Practical Training in Legal Education," a report of the Committee of Governing Bodies of the Legal Profession in Canada.

American Bar Association Journal, June 1959: "Code of Standards for Bar Examiners" by Homer D. Crotty. The same Journal for August: "Medico-Legal Instruction in Law Schools," by William J. Curran, Director of Boston Law-Medicine Research Institute.

LEGAL HISTORY

Dr. F. A. Mann, LL.D., writing in the *Law Quarterly Review*, April 1959, gives "Outlines of a History of Expropriation."

Law Quarterly Review, July 1959: Mr. E. W. Ives on "Promotion in the Legal Profession of Yorkist and Early Tudor England"; Mr. A. W. B. Simpson on "The Introduction of the Action on the Case for Conversion."

RULE OF LAW

The *Journal of the International Commission of Jurists*, Spring 1959, whose sponsors probably justify a special heading, report on the Congress at Delhi and its declaration on January of this year.

SCOTS LAW

The *Conveyancing Review*, February 1959, offers articles on "Vesting Subject to Defeasance," by Professor Henry, of Edinburgh University, and on "Professional Negligence" by Philip Caplan, Advocate.

Periodicals also received: *La Justícia (Mexico)*, *Revista del Foro (Lima)*, *The Medico-Legal Journal*, *Documentation Juridique Étrangère*, *Jus (Milan)*, *Indian Law Quarterly Review*, *International Review of Criminal Policy*, *Estudios Jurídicos (Peru)*, *La Nacional Financiera, S.A. en el Progreso Económico de Mexico*, *Textes Législatifs Étrangers (Brussels)*.

RECENT LITERATURE

An Introduction to Scottish Legal History. Stair Society Volume 20. 1958. Edinburgh: The Stair Society.

When in 1936 the Stair Society produced its inaugural volume on the *Sources and Literature of Scots Law*, Lord Macmillan welcomed it as an important step towards the ascertainment of the materials which existed for the historian who would some day write the history of the Law of Scotland. Now, in its latest volume, the Society has gathered the fruits of twenty-two years of patient publishing and editing of original documents and taken another significant step towards the ultimate goal of a comprehensive history of our law. As Lord Normand recognises in his preface, the consummation of that hope may still be far distant, but *An Introduction to Scottish Legal History* is a stimulating and indeed exciting progress report which presents the principal topics of our law against the rich background of its history.

Part I of the volume outlines the general development of Scots Law and attempts for the first time to assess the relative importance of the varied elements which were later fused by what Mr. Irvine Smith rightly describes as the " sheer genius " of Stair into a distinctive and coherent system. The first chapter, written by the late Lord Cooper of Culross with the easy grace that lightens erudition, relates the growth of Scoto-Norman law until 1329 on the pattern founded in England by Glanville. Four succeeding chapters, competently compiled and finely written by Mr. Campbell Paton and Mr. Irvine Smith, carry on the story to the present day. The main threads that make up the fabric of our law have long been known—Feudal Law, Roman Law, Canon Law and the decisions and legislation of the College of Justice shot through with strands of the " good old law " and the metaphysics of Stair; but here for the first time is a carefully balanced account of how the pattern has been woven. This must have been a difficult task—it has been supremely well done.

Part II of the volume develops the history of particular branches of the law and practice grouped in four main sections, (A) The Law of Persons, (B) The Law of Property, (C) Other Branches and (D) The Courts and Procedure.

Section A commences with an admirably logical exposition of pre-Reformation Canon Law by Bishop Scanlan, an excellent foundation for the two immediately succeeding articles by Professor Ireland which give the most coherent account of the historical development of the Scots law of marriage which has yet appeared. Outstanding contributions in this section are those of Professor Anton on Parent and Child and Professor Smith on Master and Servant, the former distinguished by its scholarly handling of much completely new material and the latter by its elegant and eminently readable treatment of a difficult socio-legal topic.

It was perhaps inevitable in a work of this scope that space should be jealously rationed, but for your reviewer the enjoyment of this section was somewhat marred by a recurrent awareness of effort on the part of the authors to achieve brevity, even at the cost of completeness of treatment, so that the effect, in the case of some articles, was of an able essay in compression rather than a historical account *teres atque rotundus*. The more recent and comparatively well-known developments of the law suffered most, *e.g.*, the brief and uninformative reference to the Intestate Husband's Estate Acts at page 110, the complete omission of the alterations to the substantive law of terce and courtesy effected by the Conveyancing (Scotland) Act, 1924, and the neglect of the curious and interesting story of how feu duties and other heritable items came to be excluded from the subjects liable in terce. The quest for brevity also leads in places to misleading oversimplifications such as that on page 127 where the statement in relation to *non valens agere* that years of minority did not count in the computation of prescriptive periods requires qualification at least as regards the 1874 and 1924 Conveyancing Acts, and the inference on page 107 that section 20 of the latter statute barred objection to the absence of judicial ratification only in deeds relating to land, whereas the provision of the section in terms applies to deeds whether relating to land or not.

The same defect is noticeable at the beginning of Section B, the Law of Property. Dr. Milne's attractive article on Early Feudal Tenures, with which the section opens, is accurate and lucid, but it is a matter for regret that she did not develop her theme more fully. Her attempt to deal with Burgage Tenure in five lines surely represents the *ne plus ultra* of ruthless compression: it is courageous, but it adds nothing to our knowledge. With the next and subsequent articles in this section, however, we breathe an ampler air. Professor Monteath, either specially licensed or boldly defiant, occupies more than forty pages with a comprehensive and thoroughly satisfying account of the history of Heritable Rights. No less adequate is the treatment of Moveable Rights by Mr. Mackenzie Stuart, Succession by Mr. Irvine Smith and Diligence by Mr. David Maxwell, and Professor Dewar Gibb contributes on the subject of Insolvency a vignette of clarity and precision by a master in the art of writing on the law.

The quality of the articles in this section is uniformly excellent and the only very small criticism is that Mr. Irvine Smith might well have reconsidered his statement (on page 211) as to the rights of succession of children of hand-fasting unions in the Highland regions if he had had available to him Professor Anton's article in the *Scottish Historical Review* (October 1958) which demonstrates that marriage by hand-fasting was never recognised in medieval Scotland after the introduction of Christianity.

Section C contains four admirable contributions on individual branches of the law. Mr. Mackenzie Stuart makes excellent use of all the newer sources and many of the more familiar ones in a splendid article on Contract and Quasi Contract. Sheriff McKechnie brings to the subject of Delict and Quasi Delict deep scholarship and a felicity of style which bears lightly and easily the burden of the most comprehensive citation of authorities ancient and modern. An excellent section concludes with able and valuable articles on Criminal Law by Mr. Irvine Smith and Mr. Ian Macdonald and on Evidence by Professor Walker.

For the reader primarily interested in the development of substantive law Section D (Courts and Procedure) promised to be much less fertile of interest. Nevertheless, and despite the quality of what has gone before, Mr. Duncan in its opening article on the Central Courts before 1532 contrives to attain a new peak of excellence. Extraordinarily rich in material from original sources, Mr. Duncan's article is yet free from the vice of according to reasoned conjecture the status of established fact, and he does not fear to express candid doubt or controversial opinion. If the main object of the volume is to provide a basis for and a stimulus to further study, Mr. Duncan's article, perhaps more than any other, amply fulfils its purpose. In the more fully documented field of the history of the Central Courts after 1532, Lord Cooper has written with authority and lucidity the last of his great contributions to legal scholarship. As is perhaps inevitable the remaining articles in the section, all thoroughly competent, suffer by comparison, but your reviewer particularly enjoyed those by Dr. Gordon Donaldson on the Church Courts, by Professor Pryde on the Burgh Courts and by Professor Croft Dickinson on the Courts of Special Jurisdiction.

One of the most salutary features of this book is the number of misconceptions which it reveals in the reader's own knowledge, although on occasion he may still cherish his former prejudices. One illustration is the statement by Mr. McIntyre on page 374 that, since all rights of jurisdiction belonged to the King, the right of a lord to hold a court, even a baron court, was dependent upon an infeftment *cum curiis* in medieval Scotland, since the jurisdiction was something different from the land. That a specific grant of jurisdiction was necessary in charters by subject superiors is well established, but did a Crown grant of a barony in medieval times not imply, without special mention of it, a grant of the appropriate baronial jurisdiction? Craig (J. F. 3.7.8) specifically states that it does. Moreover, the ordinary form of a royal charter of barony lands in medieval times inserted the right to hold courts, where specially mentioned, only in the tenendas clause, *e.g.*, Balfour of Burleigh Papers No. 1 (1350): Book of Carlaverock No. 14 (1357): Red Book of Grandtully No. 19 (1480). It is settled law since the decision of the House of Lords in *Earl of Aboyne* v. *Farquharson*, 16th Nov. 1814, F.C., that in the construction of old charters a separate feudal right cannot be conferred by mention in the tenendas clause only, and so, unless a grant of jurisdiction was implied in the grant of the barony lands, many of the old royal charters which bore to confer upon the baron the right to hold courts did not in effect do so. If, on the other hand, the grant of the lands implied the right of jurisdiction in such a case, the tenendas clause is explicable as merely explanatory, and indeed there is nothing in the normal form of the clause to indicate any special character in the reference to courts which distinguishes them from the other items such as woods, plains, moors, etc., with which they are commonly associated. Did the House of Lords err in attributing to the medieval draftsmen too nice an appreciation of the functional character of a tenendas clause, or is Mr. McIntyre's proposition too widely stated?

Congratulations on the general arrangement of the volume are due to Mr. Campbell Paton, who has discharged most ably the task of co-ordinating the work of the various authors and has still found time to make notable contributions himself. In particular what the Society's illustrious eponym himself called " the nauseating burden of citation " has been well handled and the method of including citations in the body of the text has not unduly interfered with the pleasure of reading. The index compiled by Mr. J. A. Christie is rather brief but within its compass is adequate.

The last word must be of appreciation for the vision of the late Lord Cooper who planned the whole work and to whose memory the volume is fittingly dedicated. In a well-known passage Lord Cooper has said, " It was not in the invention of new doctrines or procedural methods that the genius of the architects of our system was displayed, but in the creation of a synthesis of philosophical jurisprudence." In almost every chapter of the book that he inspired the validity of that analysis is strikingly illustrated; it offers to the reader not merely a delectable journey into the history of the law of Scotland but invites him into what was in Lord Cooper's words " for 500 years *par excellence* the home of Comparative Law."

J. M. Halliday.

The Trial of Peter Manuel. By John Gray Wilson. 1959. London: Secker & Warburg. Price 21s. net.

As Sheriff Wilson himself remarks, what makes the *Manuel* case " truly unique and important is the way in which it gathers together in one trial features that have made celebrated many other trials. It is just because Manuel is so typical of one kind of murderer—perhaps a little larger than life, but still typical—that he poses so sharply and so challengingly the problems which he does." These are the problems which are of fundamental interest to the criminal authorities, the criminologist and the penal reformer. They are frankly and instructively discussed in the concluding chapter of this book. Sheriff Wilson does not attempt to solve them but puts forward " some suggestions for the consideration of the general public." He deals in turn with the efficiency of criminal investigation, the existence of a criminal underworld in the large cities and, lastly, the treatment of the criminal psychopath. The suggestions, which the author quotes, that a more extensive training should be given to detectives and that a central Scottish C.I.D. should be established, seem worthy of serious consideration. But to say that is not to imply that there was any inefficiency in the investigation of Manuel's crimes.

The existence of a criminal class in the larger cities presents a most intractable problem. Few who have had any practical experience of dealing with criminals will disagree with Sheriff Wilson's opinion that " a disinclination to work " is the explanation of the existence of this class. Is it beyond the wit of penologists to devise methods of assisting criminals to overcome this disinclination? If useful work was available for prisoners, their release could be made conditional upon their making at least some reparation to those whom they have wronged.

Lastly, there is the problem of the psychopath with criminal tendencies as exemplified by Manuel. Sheriff Wilson has no doubt that Manuel was a psychopath but goes on to say that this does not explain matters. Indeed it does not. What is psychopathy? In Sheriff Wilson's view it is " a condition " which is more of a deformity than a disease. Its victims " are born lacking any social or moral sense." Surely this is begging the question. Alienists have described the psychopath as one who appreciates the distinction between right and wrong but repeatedly does what is wrong rather than what is right. Why should it be assumed that such a person is suffering from any kind of mental abnormality or that he is an appropriate subject for psychiatric treatment? As Lord Cameron told the jury, " A man may be very bad without being mad." *Video meliora proboque deteriora sequor* is surely the cry of the sane rather than the mentally impaired or deformed.

No serious reader will be able to put down Sheriff Wilson's book without realising how important it is that earnest attention should be given to these questions.

The account of the trial itself, condensed into a mere 170 pages of print, is masterly. By combining the selective use of verbatim reporting with factual and descriptive narrative, Sheriff Wilson has succeeded in presenting a vivid picture of the principal actors and evoking the atmosphere of the court-room. The appeal, which did not raise any questions of great legal importance, is described in a further seven pages.

D. W. R. B.

Acta Juridica, 1958. Published under the auspices of the Faculty of Law, University of Cape Town. 1959. Cape Town: A. A. Balkema.

This is the first issue of a journal which is the successor to *Butterworth's South African Law Review*, an annual publication which first appeared in 1954. In the Preface it is stated that the first issue was intended to be a *Festschrift* for Robert Warden Lee on his ninetieth birthday, but Professor Lee having died in January 1958, several months before attaining his ninetieth birthday, it was decided to make the issue a special number dedicated to his memory.

The volume contains contributions from distinguished lawyers from many parts of the world, and the editors are to be congratulated on having produced a worthy memorial to a great lawyer and a great scholar. In this country Professor Lee is chiefly known for his contributions to Roman Law and comparative law, but in South Africa he is better known as the author of two works which hold a pre-eminent place in South African legal literature—his *Introduction to Roman-Dutch Law*, an acknowledged South African legal classic now in its fifth edition, and his invaluable translation and commentary on Grotius' *Inleiding*. South African law owes a great debt to

Professor Lee, and the appearance of this memorial volume should therefore be particularly welcomed by South African lawyers.

As is befitting in a volume dedicated to a jurist of such wide interests as Professor Lee, the contributions—twenty-six in number excluding book reviews—cover a very wide field. A large number of the articles deal with special topics in Roman and Roman-Dutch law; for example, " Implantatio and Satio," by Professor David Daube; " Obscurities in the Development of Damnum," by Mr. R. W. M. Dias; " Liability for Animals in Roman Law," by Mr. Barry Nicholas; and " Over de oorsprong van twee omstreden paragrafen uit de Inleidinge van Hugo de Groot (III. 32.2 en III. 34.2)," by Professor R. Feenstra. There are also several articles dealing with specific problems of South African law; for example, " The Nature of a Trust in South African Law," by Mr. I. B. Murray; " Liability of a Deceased Estate for Maintenance," by Professor B. Beinart; and " Gebruik as Grond vir Verrykingsaanspreeklikheid," by Dr. Wouter de Vos. In addition, there are articles of a more general nature; for example, " Progress and Regress in Law," by Professor Giorgio del Vecchio; " The Vindiciae contra Tyrannos," by Professor A. H. Murray; and " Legal Education in South Africa," by Mr. C. C. Turpin. The quality of the contributions varies but on the whole it is of a high order, and it can safely be predicted that every lawyer, however specialised or limited his interests may be, will find something of interest and value in this special number.

It is obviously impossible to attempt to review in detail a work of this nature, and in what follows it is proposed merely to offer a few comments on three of the articles which have particularly interested the reviewer.

Professor Lee says somewhere that it is sometimes more important to know what the law was thought to be than what it actually was. The truth of this observation is well illustrated by Professor Beinart's article on " Liability of a Deceased Estate for Maintenance." Professor Beinart shows that in holding that a father's duty to support his illegitimate child transmits to his estate, de Villiers C.J. in *Carelse* v. *de Vries* (1906) 23 S.C. 532, disregarded the contrary view of Voet and other Roman-Dutch authorities and relied mistakenly on Groenewegen *ad* D.34.1.15; in the passage in question Groenewegen is dealing with aliment due under contract or legacy and not *ex lege*. The case, however, has led to a number of decisions in all of which the authority of Groenewegen is invoked, with the result that it must now be taken to be settled law that the duty transmits. As it is clearly socially desirable that a claim for maintenance should be enforceable against the deceased estate of the person owing the duty, it may confidently be predicted that there is little likelihood of the question being reopened: *communis error facit jus.*

In " The Problem of Causation in the Aquilian Action " Professor T. W. Price argues strongly in favour of the acceptance by the South African courts of the " direct consequences " rule. Although the reviewer has always been a supporter of the " direct consequences " school of thought, he finds it impossible to agree with several of the views expressed by Professor Price. For example, it seems to him to be quite wrong to identify, as Professor Price does, the " direct consequences " theory with the *causa sine qua non* concept. Surely all theories of causation accept the *causa sine qua non* concept as their basic principle and differ only in regard to the limitations to be placed upon it. Again, it may be doubted whether Professor Price strengthens his case by dogmatically asserting that " the Romans were of the direct consequences school." It is true that there are texts in the *Digest* which could be invoked in support of the " direct consequences " rule; but the truth of the matter would appear to be, as Buckland and McNair point out in *Roman Law and Common Law*, that the Roman lawyers " never really faced the question of causation." Professor Price quotes this well-known statement, but summarily dismisses it with the observation that " this is an odd remark to come from authors whose own system has found considerable difficulty in deciding on what basis it will deal with that question." But surely the fact—assuming it to be a fact—that it is an " odd remark " is irrelevant; the only relevant consideration is whether it is a true remark; many an odd remark is also a true remark. Furthermore, in criticising the decision in *Mulder* v. *South British Insurance Company*, 1957 (2) S.A. 444 (W), in which it was held on facts similar to those in *King* v. *Phillips* [1953] 1 Q.B. 429, that the defendant was not liable to the plaintiff for causing her a nervous shock, Professor Price deplores the fact that no Roman-Dutch authorities were referred to. So far as the writer is aware, none of the old authorities discusses the question of liability for causing another a nervous shock. One wonders, therefore, what Roman-Dutch authorities could usefully have been cited—Professor Price mentions none. Finally, Professor Price would appear not to appreciate the effect of the Apportionment of Damages Act, 1956, on the " last opportunity " rule. Section 1 (1) (*b*) provides: " Damage shall . . . be regarded as having been caused by a person's fault notwithstanding the fact that another person may have had an opportunity of avoiding the consequences thereof and negligently failed to do so." It would seem clear that the effect of this provision, which was inserted in the Act in pursuance of a suggestion made by the reviewer in an article entitled " The Apportionment of Damages Bill, 1952," published in (1953) 70 S.A.L.J. 41, is to preclude the courts from invoking the last opportunity rule as a test of causation in cases to which the Act applies. Yet Professor Price refers to various cases in which the last opportunity rule was applied as if they were still good law, and concludes his discussion of the Act by stating that " if the Act has succeeded in delivering the *coup de grâce* to a rigid and artificial application of a so-called last opportunity rule it will have gone a long way to remedy an unsatisfactory state of affairs," thus implying that it is still competent for the courts to have regard to which of the parties had the last opportunity of avoiding the accident by the exercise of reasonable care. One is reminded of the observation of Lord Shaw in *Hyman* v. *Hyman* [1929] A.C. 601, at 623: " Nothing will apparently avail—not the judgment of this House, not even the words of an Act of Parliament—to stay the spade of the legal resurrectionist."

English law, like South African law and most Continental systems of law, does not accept a general doctrine of the binding effect of a unilateral declaration of will. In "Pollicitatio—Promise and Offer," Professor T. B. Smith discusses the history and theory of pollicitation in Scots law, and founding on various authorities, in particular Stair I.10.4, submits that Scots law recognises that a person may bind himself by a simple declaration of his own will. He expresses the view that the approach through the concept of a unilateral juristic act leads to a more satisfactory solution of various problems in the field of obligations, *e.g.*, problems concerning options, stipulations for the benefit of a third person and advertisements, than the approach through contract. He supports this view by reference to decided cases, and it must be conceded that there is considerable force in some of the arguments he puts forward. Nevertheless, the reviewer remains an unrepentant "bilateralist." It is so ingrained in his mind that a purely unilateral juristic act will not suffice to create a binding obligation that he feels, as Professor Gino Gorla puts it in a passage in *Il Contratto* quoted by Professor Smith, that it is bordering on the ridiculous (*quasi assurdo*) that, save in exceptional cases, a person should be bound to another by a simple declaration of will without that other having in any way assented thereto or relied thereon. Furthermore, he is unable to agree with Professor Smith's view that the refusal of South African law to recognise *pollicitatio* as an institution distinct from contract has frustrated the development in South Africa of the law relating to *jus quaesitum tertio* by forcing the courts to lay down the rule that acceptance by the *tertius* is necessary before he can acquire an enforceable right against the promissor. It seems to the reviewer that this is both a logical and a desirable requirement. A *stipulatio alteri*—in South African law at any rate—is best regarded as analogous to an option. The stipulator acquires the option of a benefit for the *tertius* and if the *tertius* wishes to avail himself of the benefit he must exercise the option, *i.e.*, he must notify the promissor of his acceptance of the benefit, or, if notification of acceptance has been dispensed with by the promissor, as in *Croce* v. *Croce*, 1940 T.P.D. 251, he must at least do something to indicate that he accepts the benefit. Moreover, if a unilateral declaration of will is sufficient to create a binding obligation there would seem to be no real need for the institution of *stipulatio alteri*—for in nearly every case the same result could be achieved without resorting to it.

R. G. McKERRON.

Jurisprudence. Second edition. By M. J. Sethna, PH.D. 1959. Bombay: Lakhani Book Depot. Price: Rs. 13.25.

Professor Sethna introduces his book with a brief discussion of the principal theories of law, but otherwise the general arrangement of the book and the author's choice of subject-matter follows the pattern of books written from an analytical standpoint traditional in England since the publication of Holland's *Jurisprudence*. The book contains many interesting illustrations drawn from Indian law. Its originality, however, lies in the fact that it is written from the standpoint of the School of Synthetic Jurisprudence founded by the author on July 21, 1955. "Jurisprudence," he declares, "should be, at the same time, analytical, historical, comparative, philosophical, and sociological.

There should be an amalgam of principles derived from the social studies; and jurisprudence should suggest changes for the better with the march of time and the onward progress of society. . . . In this work I have dealt with the fundamental principles and the legal concepts based thereon, not merely in the form of logical analysis, but in the light of philosophy and sociology, with the method of constructive criticism " [p. 40]. The author's general conclusion as to the various Schools of Jurisprudence is this: " Each School has its importance, individuality and value. From the academic point of view, it is advantageous having schools and scholars, but from the point of view of *final truth*, and in the interests of the study of legal principles, we should have *Synthetic* Jurisprudence. The best principle is that of having an amalgam of the best principles found expounded in each school of jurisprudence and consider jurisprudence as a psycho-socio-ethico-legal study " [p. 46].

A. E. Anton.

Conflict of Laws. Part One: Jurisdiction and Judgments. By Albert A. Ehrenzweig. 1959. St. Paul, Minnesota: West Publishing Company.

Professor Ehrenzweig is already well known to specialists on the conflict of laws as the writer of articles which are a rare combination of learning and common sense. He now offers to these specialists, and to a wider legal public, a general treatise on the conflict of laws from a United States standpoint. So far there has been published only the first part, which deals with jurisdiction and judgments: the second part, dealing with choice of law, is to follow.

As the author's earlier article on *Interstate and International Conflicts Law* (41 *Minnesota Law Review* 717 (1957)) foreshadowed, he treats separately, international and inter-state or sister-state conflicts. This greatly conduces to clarity of exposition, since identical rules do not operate in the two cases. In the United Kingdom there are a few statutory rules regulating conflicts of law between the English and Scottish systems, but we are spared the complex problems of inter-state relationships which occupy international lawyers in the United States. To the foreign reader the author's approach to international conflicts is of greater interest. Professor Ehrenzweig's knowledge of comparative law equips him particularly well for his task. No writer since Story has taken fuller account of foreign and, particularly, European contributions to the study of private international law, and the author shows astonishing familiarity with current periodical literature including that published in Scotland. As a consequence the apparatus of citation is formidable —perhaps, for the ordinary reader, even excessive.

In the United States, each state has in theory and to some extent in fact its own conflicts system, and the author shows an admirable restraint when he confines himself to commenting that " a national law of conflict of laws would be highly desirable and . . . in course of time . . . might become a necessity " [p. 29]. While there is a large reservoir of principles which are common to every state and very similar to those adopted in this country, there are inevitably even fundamental questions to which different rules apply. Thus the American courts, in general, base their recognition of foreign judgments on the principle of comity, with all its inherent ambiguities. Although the Supreme Court in *Hilton* v. *Guyot*, 159 U.S. 113, attempted to establish a principle of reciprocity, many states, including New York and California, reject this requirement and several of those which accept it do so subject to qualifications, such as the rule that it is inapplicable to judgments *in rem*. But it is impracticable to enter into the detail of the law. It suffices to say that the United Kingdom reader who seeks for a guide to the Conflict of Laws in the United States could not do better than look first to Professor Ehrenzweig's book. There could hardly be a simpler, better arranged, or more lucid treatment of this complex branch of the law.

A. E. Anton.

Contempt of Court. A Report by "Justice." 1959. London: Stevens & Sons, Ltd. Price 5s. net.

This pamphlet of 42 pages is prepared by the Society which has taken the name of "Justice" from its purpose of assisting the maintenance of the highest standards of the administration of law. The Society is affiliated to the International Commission of Jurists. The present publication sets out that its purpose is to recommend what the law *should* be and how this is to be attained rather than what the law is, about which it has doubts. The discussion is limited to the law of England, and the authors feel there is considerable ground for necessary reform. It would be invidious for those elsewhere to criticise their proposals. They seem likely to obtain a good deal of support. It might be unwise to say that criticism of the Scots Law of Contempt is never made, but that law seems to be different and in many ways simpler. The English practice in its present form dates back to the Star Chamber. The Government have now promised to look at the position in England. The main controversy has, of course, centred round the liabilities of the Press with regard to pending cases, which are cases of contempt committed outside the court, and which Fleet Street feels are rather hard on it. How far should ignorance be a defence? The argument here put forward is that the law should be defined or altered to make it so where justifiable. It also considers that the somewhat artificial rule that proceedings before masters are confidential has no justifiable basis. The line should be drawn so as to prevent "trial by newspaper." It would be interesting to know how these matters work out in Continental countries and in America, where the extreme cases of which we hear seem to differ greatly from our own; but information is lacking. There is certainly nothing extreme advocated by the Society.

The procedural remedies suggested are perhaps equally relevant. The most important is the institution of a right of appeal, though it is also suggested that the permission of the Attorney-General should be necessary for proceedings being started. Our own history of a right to punish for "prevarication" as contempt without any real limitation supplies an ancient analogy now probably in desuetude.

S. G. Kermack.

Legal Penalties. A Report by "Justice." 1959. London: Stevens & Sons, Ltd. Price 3s. 6d. net.

This is a report by *Justice*, the British Section of the International Commission of Jurists, upon the need for revaluation of penalties. The Chairman is Sir David Cairns, Q.C.

From time to time the popular press publishes reports of cases decided, usually in the magistrates' courts, which terminate in sentences allegedly shocking by reason of their inconsistency *inter se*. This is one, but only one, of the matters dealt with in this brochure.

The report as a whole is concerned with reform in the sentences permissible for a wide range of offences. It touches upon the futility of fixing maximum sentences at all; upon the question whether some of the *maxima* are too low; upon whether it matters that some of them are too high; upon whether reform is practicable; upon the formulation of general rules as to matters which may be taken into account by way of mitigation or aggravation.

Many examples are given in illustration of the abuses—they are nothing short of this—which exist at the present time. It is truly said that there has probably been a bigger revolution in social values in the last thirty years than in any previous hundred years, whilst scales of punishment have remained largely unchanged. Consider, for example, the tendency, which makes less appeal today, to rate offences against the person as less serious than offences against property, though the penalties still upon the Statute Book reflect the contrary view. For example, "the abduction of a woman with intent on her fortune involves a maximum of fourteen years, but the abduction of a girl of fourteen with intent on her virtue only two years." Tables illustrative of the present unsatisfactory distinctions occupy some seven pages of the brochure.

This valuable report beyond question makes out a weighty case for reform. No mention, however, is made of the law of Scotland, where the maximum penalty plays a far less important part than in England. The superior elasticity and simplicity of our system in this report are certainly a fact to be taken into account in any plan of reform. And important and desirable as reform is, it is to be feared that an adequate scheme for so large an undertaking is still far in the future, given the present congestion of Parliament.

A. D. Gibb.

The Cy-Près Doctrine. By L. A. Sheridan, LL.B., PH.D., and V. T. H. Delany, M.A., LL.D. 1959. London: Sweet & Maxwell, Ltd. xxxvi and 166 pp. Price £2 10s. net.

Dr. Delany, whose periodical articles on various aspects of the law of charities are well known, has collaborated with Professor Sheridan to produce a valuable analysis of the *cy-près* doctrine as applied in charity cases. Although written primarily from the standpoint of English law, it merits attention in Scotland for several reasons: first, because our doctrine of approximation, though possibly not derived from its English counterpart, has been decisively influenced by it; second, because there is no up-to-date exposition of the law from a Scottish point of view; and third, because the authors have carefully scrutinised the leading Scottish cases, overlooking only a few decisions of minor importance.

The authors, however, overstate their case when they say that in Scotland "the *cy-près* doctrine is applied on precisely the same principles as in England" (p. 24). In this domain Scots law has borrowed heavily from English decisions, but these must always be read in the context of the general English law of "charities" and in consequence are not always authoritative in Scotland—*Wink's Executors* v. *Tallent*, 1947 S.C. 470; 1947 S.L.T. 316. Thus, as the authors themselves mention, our courts do not confine the application of the *cy-près* doctrine to trusts which are "charitable" in the technical language of English law, but extend it to all trusts for the utility of the public—*Anderson's Trs.* v. *Scott*, 1914 S.C. 942; 1914, 2 S.L.T. 157. Another important distinction lies in the fact that Scots law insists that the *cy-près* doctrine is applicable only when there is evidence of "general charitable intent"—*Burgess's Trs.* v. *Crawford*, 1912 S.C. 387; 1912, 1 S.L.T. 153, and many subsequent cases including *Hay* v. *Murdoch*, 1952 S.C.(H.L.) 29; 1952 S.L.T. 198. The authors tell us that proof of a general charitable intent is unnecessary in England "in cases of supervening impossibility if the original gift was out and out" (p. 96). They continue: "In Scotland, the authorities are in some confusion. The House of Lords have seemingly insisted on a general charitable intent as a prerequisite to *cy-près* application even in these cases: *Hay* v. *Murdoch*; but several previous (though by no means ancient) cases indicate that the rule is the same as in England." A perusal of these cases, however, shows that in none of them was the question of "general charitable intent" discussed by the court although in one case the question was referred to by counsel in argument. *Hay* v. *Murdoch* and several recent Outer House decisions[1] indicate conclusively that in our courts proof of "general charitable intent" is a necessary condition of the application of the doctrine.

The book contains copious illustrations from Commonwealth systems based on English law. This greatly enhances its interest to the Scottish lawyer. The authors, however, are primarily concerned with English law and as a monograph on a particular branch of that law it could hardly be bettered. Carefully and logically arranged, clearly and attractively written, the book is a fitting tribute to the distinguished scholar to whom it is dedicated, Professor J. L. Montrose of the University of Belfast.

A. E. ANTON.

Introduction to the Law of Property. By F. H. Lawson, Professor of Comparative Law in the University of Oxford. xii and 200 pp. 1958. Oxford: at the Clarendon Press. Price 15s. net.

This is the first volume to appear in the new *Clarendon Law Series*, under the general editorship of Professor H. L. A. Hart. The object of the series is to provide general introductions to different fields of English law which will be of interest and use not only to students of law but to students of history, philosophy, or the social sciences, and to the general reader who wishes to acquaint himself with some particular branch of law.

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[1] *Macrae's Trustees*, 1955 S.L.T.(Notes) 33; *Paterson* v. *Aberdeen Sailors' Mission Institute*, 1953 S.L.T.(Notes) 33; *Forrest's Trs.* v. *Forrest's Trs.*, 1959 S.L.T. (Notes) 24; *Cameron's Trs.* v. *Edinburgh Corporation*, 1959 S.L.T.(Notes) 32.

The law of property—more particularly the law of real property—is generally regarded as one of the most technical and obscure branches of English law. Yet, by adopting what he terms a mixed analytical and functional approach and for the most part neglecting history, Professor Lawson has succeeded not only in expounding with admirable lucidity the basic principles of the English law of property, but also in explaining their *raison d'être*—and all this within the space of 200 pages. In *The Rational Strength of English Law* Professor Lawson claims that the law of property is " one of the finest parts of English law and superior in its main principles and structure to all foreign laws dealing with this subject." Many, no doubt, would dispute this claim, but the present work goes a long way to substantiate it. At any rate, no one can read this book without being impressed by the remarkable combination of ingenuity and practical common sense displayed by the property lawyers who have shaped and developed the conveyancer's side of property law, and by the commercial lawyers who have shaped and developed the property side of commercial law.

One of the great merits of the book is its philosophical approach; it avoids, as far as possible, the usual divisions into real and personal property and portrays the law of property as a whole. There are of course irreducible differences between moveables and immoveables. But as Professor Lawson convincingly shows, there is a great deal of doctrine common to both, not only where they are treated as interchangeable components of funds, but also where they are treated as individual objects.

One of the most interesting and illuminating chapters is that entitled " The Fragmentation of Ownership." Other chapters which the reviewer found of particular interest were those on " The Impact of Public Law " and " The Co-existence of Property Interests in Several Persons." The chapter on " The Classification of Things " also deserves mention for its masterly analysis of the abstractions and legal concepts with which the property lawyer is concerned.

The reviewer's only criticism is that the treatment is so compressed that the book may perhaps prove too difficult for the average student approaching the study of the law of property for the first time. Subject to this qualification, the book is one which should be read by everyone who wishes to gain an insight into this branch of the law. Even expert property lawyers may learn much from it; as Professor Lawson states in the Preface, one of the grounds on which Professor Hargreaves encouraged him to write the book was that " it was high time for an outsider to show the conveyancers what they are really doing."

The book is admirably produced and the price remarkably modest.

R. G. McKERRON.

The Dictionary of English Law. General Editor, the late The Right Honourable the Earl Jowitt, Lord High Chancellor of Great Britain 1945–51. Editor, Clifford Walsh, LL.M., Solicitor of the Supreme Court. 1959. London: Sweet & Maxwell, Ltd. Price £8 8s. net.

In some 1,900 pages the compilers have written what one is tempted to call the Law Dictionary to end all Law Dictionaries. "The object," says the publisher's prefatory note "has been to produce a really comprehensive lexicon covering English law from earliest times to the present day." That object has been most worthily achieved and the result is a compendium which is at once semantic, expository and biographical and which will form an invaluable guide to even the most recondite topics for practitioners, students and judges. There is a universality about it and an evident desire to help and instruct the reader at every turn which form, one might almost say, an endearing feature of the work. Thus the entries under the letter Z consist of a German, an Italian and a Scots word together with an English expression, a place name and a word which this writer never knew existed—*zetetic*.

It is a book of surprises—in this somewhat resembling Brewer (without the "Fable"). Here, for example, the reader will come upon short biographies of such as Hale, Glanville and Coke, to say nothing of Cujacius and Pufendorf. As pure dictionary it abounds in extraordinary expressions such as hulka, grimgribber, reapsilver, coopertura humagium, ceapgild, lastratinus and so on.

But it is as a serious work that it must principally be judged. Here it seems to preserve an admirable balance between brevity and adequacy. Turn to such a difficult and arid topic as Housing. Here the writer wisely does not attempt an abbreviated essay: after a short general half-column he breaks up his topic under such heads as clearance area, closing order and re-development area. The work, as a good dictionary should, assumes no knowledge on the part of the reader and thus a Scottish reader can turn with confidence to a word like "assurance," so unfamiliar to him in a technical sense, though its legal meaning is a commonplace to an English lawyer. Admirable again is the article on "Heir" in the *Dictionary* and one to which a Scots lawyer may well turn for enlightenment.

In a Scottish review it is not infrequently proper to consider whether a new work possesses interest or usefulness for the Scots lawyer. About this work there can be here no doubt. The prefatory note explicitly states that "Terms derived from Scottish law . . . are included where they are of concern to the English lawyer." And this promise is certainly made good. Whether the work mainly relied upon as a source is the most happily chosen it is manifestly not for this writer to say. Certain it is that the pages abound in such esoteric words and expressions as Lord Probationer, service of heirs, double avail, remeid of law, old extent, real raiser, real burden, thirlage and many others. All of which is extremely satisfactory. Finally, the *Dictionary* contains a fairly exhaustive collection of Latin and French brocards and words.

This majestic and authoritative volume is bound to put all current law encyclopaedias and dictionaries in the shade. A. D. GIBB.

Law and Opinion in England in the Twentieth Century. Edited by Morris Ginsberg, D.LIT., LL.D., F.B.A., Professor Emeritus of Sociology in the University of London. 1959. London: Stevens & Sons, Ltd. Price £2 2s. net.

The late A. V. Dicey's lectures on the connection between law and opinion in England in the nineteenth century, delivered at Harvard in 1898 and published in 1905, have long been recognised as a very important survey of the connection between trends of thought and the changing pattern of the law, a revelation in particular of the immense posthumous influence of Bentham. The second edition in 1914 had a long new introduction surveying, in generally pessimistic terms, the changes, striking and even radical, wrought in the decade before the First World War ended the old state of things.

We have now, after the lapse of roughly half a century, a fresh examination of the same theme for the period since Dicey's lectures, in the form of reprints of seventeen public lectures delivered at the London School of Economics in session 1957–58 by distinguished scholars, mostly on the staff of the School, but reinforced by outsiders. While the main theme was to continue Dicey's work, to take account of the developments since his time, and to widen it so as to explore not only legal changes but the wider aspects of social policy, the major difference, that each lecture was composed independently by a different person, has necessarily involved some discontinuity, changes of style and approach, and a measure of overlapping. On the other hand Dicey's views, and the developments of the twentieth century, are herein surveyed from different standpoints and with different premises, by individuals writing about their own fields of special interest. Not every standpoint is represented; thus the connections between opinion and constitutional law, and between it and developments in tort, are not discussed; there is little about the changing attitude of the judiciary; but then much is included which was foreign to Dicey's thinking, or at least was ignored by him, or has attained importance since his time.

The lectures fall into three groups; first there are five on Trends of Thought, which include contributions on the thought of the three main political parties, then eight on Legal Developments, and finally four on Trends of Social Policy, in relation to Health, Education, Social Security and Industrial Relations. Detailed comment cannot be made about all. It must suffice to indicate some factors which appear over and over again, the greatly increased power and importance of trade unions in our society, the increase of the power and influence of the State and of its regulation and control of our lives even in details, the shift in the interest and importance attaching to various branches of the law, and the greatly increased emphasis on social policy, the growth of the social conscience, and the deliberate modification of the law to conform to the currents of social thought and to execute social policy. Also interesting as compared with Dicey's lectures, where the influence of Bentham was everywhere noticeable, is the absence in the twentieth century of any commanding figure whose thought is being worked out. The underlying philosophy of modern British law and opinion is anonymous and not attributable particularly to any one teacher; indeed Bentham is still possibly the father of it all.

The quality of the various lectures naturally differs and any relative evaluation tends to be subjective and to reveal personal preferences and possibly prejudices. But with that caution the reviewer confesses his greatest admiration for Professor Ginsberg's thoughtful and illuminating opening lecture on the Growth of Social Responsibility, Professor Gower on Business Law, Professor Kahn-Freund on Labour Law, Professor Titmuss on Health and Professor Glass on Education, all of which seem to him outstanding, though none of the others falls below a high standard of interest and analysis.

This is a very important and valuable book which should be widely studied, not only by students of jurisprudence (though it will inevitably at once become, and long remain, recommended reading for them) but by everyone who is interested in law as more than the mumbo-jumbo and stereotyped rules of everyday practice and routine. It reveals law as a vital social force, moulded by social, philosophical, political and economic trends and developments, itself reacting on those trends, a changing, developing, living body, not a dead body of static doctrine. It emphasises the need for periodical reappraisal of this very important theme, and is a model of how such a study can be done. The highest credit is due to the L.S.E., the organisers of the course of lectures, and to the scholars who delivered such erudite, thoughtful and intensely stimulating contributions; any man who fails to be interested, informed and enlightened by this book is indeed dull.

DAVID M. WALKER.

The Legal Historian, No. 1. The American Society of Legal History. 1958. Indianapolis: The Bobbs-Merrill Co., Inc.

The cause of Legal History in America has hitherto had, somewhat surprisingly, a short and far from smooth passage. In December 1933, at a meeting of the American Association of Law Schools a society, called the American Legal History Society, was formed but unfortunately through lack of funds—that constant handicap to learned societies—it was possible to issue only one volume, in 1937, to members and then the society's life terminated, though round-table discussions by the Association of Law Schools went on for a time. The importance of legal history has, however, recently been increasingly recognised in America and while there are now, *inter alia*, a committee on the subject in the American Bar Association, a round-table in the Association of Law Schools, and courses in American law schools, the need for a central co-ordinating body has been felt. In December 1956, therefore, and again through the Law Schools Association, another society was started—this time called the American Society of Legal History and, as the name implies, covering not only the study of American legal history but also that of all phases of legal history, *e.g.*, English, Roman, ecclesiastical or primitive (and, though it is not specifically mentioned Scots law will be included). Thus, though the ideological roots of this Society lie in the Selden and the Stair Societies, its objects are wider in area or scope. Under the auspices of Temple

University there was published in 1957 through the joint sponsorship of that University and the new society the first issue of an *American Journal of Legal History.* This journal is issued quarterly at $7.50 a quarter.

A number of committees of the A.S.L.H. have been set up and, with material collected and edited by the Publications Committee, the first number of *The Legal Historian* has been published by the Society. This is a sort of year book—an annual journal of the administrative affairs of the Society designed to give a record of the Society's progress, a list of members, and from time to time an article. The first issue contains a chapter on the Program of the Society, including Reports of the Publications Committee and of the Committee on Preservation of Legal Records. As soon as records or documents considered valuable for the history of the American law are found, funds will be sought to publish these as well as monographs of legal history. The Society aims at encouraging the preservation of court and other legal records of all kinds. It also wishes especially to encourage the study of the history of American legal societies and how they have reached their present position, for in comparison with the study of legal institutions and of the contributions of lawyers and judges to the growth of the law, there has been much less research and study in regard to this branch of the subject. Until all the records have been collected and published, a History of American Law naturally cannot be written.

The first number also has a list of members with, in many cases, biographies; a selected bibliography of books and articles on Legal History by members; and a registry of projects in which work has advanced so far that the author is reasonably certain that a publishable manuscript in legal history will result. Both the bibliography and the registry are most interesting and impressive. Then follow news and notes on current developments in Legal History in the United States; tributes to Judge Vanderbilt and Dean Rappy, two of the first directors of the Society, who have recently passed away; a list of a number of Legal History Societies, including the Selden and the Stair Societies; and particulars of membership. The number concludes with a selection of Letters of Supreme Court Justices, which will be most helpful to the historian.

Membership of the Society costs $10.00 per annum and, by virtue of his membership, the member not only receives the *Journal* each quarter and *The Legal Historian* each year, but is also entitled to the valuable privilege of substantial discounts in buying legal history books.

The reviewer notes with interest on p. 45 a form of bequest to the Society, a number of persons having expressed an interest to further the Society's purposes and functions by gift or bequest. The Stair Society must hope that this idea will catch on in Scotland.

The future issues of *The Legal Historian* and of the *Journal*, as well as other publications of the Society, will be keenly awaited by all legal historians; and all interested in the subject will join with the reviewer in welcoming *The Legal Historian* and the *Journal* and in extending to the Society all good wishes for a very successful and prosperous career.

G. C. H. P.

Basu's Commentary on the Constitution of India. Third Edition. Vol. I, lvi and 875 pp.; Vol. II, lvi and 847 pp. 1955–56. Calcutta: S. C. Sarkar & Sons, Ltd. Price £6 net.

Basu's Cases on the Constitution of India. Vol. I, xvi and 390 pp. 1950–51. Price £1 15s. net. Vol. II, xvii and 636 pp. 1952–54. Price £2 10s. net. Calcutta: S. C. Sarkar & Sons, Ltd.

Shorter Constitution of India. By Durga Das Basu. i and 624 pp. 1958. Calcutta: S. C. Sarkar & Sons, Ltd. Price £2 5s. net.

Basu's Commentary on the Constitution of India very soon established itself not only as the major work on that particular constitution, but also as having a much wider interest. The present edition well maintains the reputation of the work. The book is much more than a mere annotation of the Indian Constitution. For each section there is a wide-ranging background, showing something of the possible origins of the provision in question by reference to similar provisions to be found elsewhere. The annotations serve equally to bring out the distinctive qualities of the Indian provisions, when otherwise a broad similarity to familiar wordings would have obscured them. The range of these annotations is wide. France, and the Irish Republic, appear as well as the British background and the federal background of the U.S.A., Canada, Australia and elsewhere.

The *Commentary* is welcome, for the constitution has many points worth studying. Though federal, it shows certain departures from the general pattern of federations; some of its devices are equally interesting. The Directive Principles of State Policy, while not novel in conception, are carried much further here than elsewhere. These principles, although contained in the Constitution (among them is part of the doctrine of the separation of powers) are unenforceable in any court, and will in their development interest students of jurisprudence and students of politics alike. They deserve attention, for that form of legislation is one which might with advantage be used elsewhere. Again all the nuances of the incorporation of conventions in the roles of President and Prime Minister are well brought out, especially in relation to the power to demand or grant a dissolution. Indeed, the list of points of interest could grow long; the provisions governing disputes as to disqualification of Members of Parliament are another example. The length of the book is only partly accounted for by the shape of the Constitution itself, which is one of great detail. This Mr. Basu defends against critics, some very distinguished. This detail, though, adds to the value of the book since it gives necessarily a much fuller account of the whole working of government in India than might be thought from the title. Thus the form and effect of judicial decrees are fully discussed. The second volume is predominantly concerned with the states of the Union, their government and relationship to the Union, but it also contains the provisions governing service under the Union and the states and those establishing Public Services Commissions for the Union and the states. In these provisions the struggle between continuity with the old civil service rules and breaches with the past is of particular interest. Both volumes then deserve study from the point of view of general interest in government and of interest in a new constitution in particular. Both interests have been well served by Mr. Basu.

The value of the two volumes on the Constitution is greatly enhanced by the two case books. There are few places in this country where there is ready access to Indian Law Reports, but through these two volumes the constitutional cases up to 1954 are available. Again, all are briefly annotated. The two volumes have the special interest of showing the difficulties of the establishment of the new State. Many cases are " transitional." But they also show the early developments in interpretation. The " equal protection clause " and the " property " clause obviously evoke reliance on United States precedents. But again it is of interest to note departures from what one might have thought to be the probable pattern. There is certainly no slavish following even where words are similar. One case shows this independence well. To assist a State transport undertaking permits for private carriers were being revoked or not renewed, proceedings which were challenged, on the grounds, *inter alia*, that they infringed the right " to practise any profession or to carry on any occupation or trade or business " guaranteed under Article 19 of the Constitution. In reaching its conclusion the court rejected English and United States authorities, both having, it was said, a common root in doctrines relating to Crown grants; thereafter the specialities of these particular rights in India were discussed. Again there is much interest in the cases turning upon whether the tests of the reasonableness of state action are objective or subjective. There is then much of purely legal interest, but even the case books have a wider appeal. Another case illustrates not merely difficulties of interpreting " equal protection " clauses but also more general social problems. In Madras entrance to the Medical School was regulated by a quota system among religious and other groups. On the one hand there was a Directive Principle that the State should protect the interests of the weaker sections of the people. On the other hand Article 29 (2) provides, " No citizen shall be denied admission into any educational institution . . . on grounds only of religion, race, caste, language or any of these." The balance between conflicting constitutional principles and conflicting social aims which in themselves are laudable is clearly brought out in the argument before the quota scheme was struck down. Thus the case books give a picture of the emerging state; equally they enable a better view to be formed of the constitution. The dispute as to whether it is too detailed or not is constantly in mind as one reads the cases. These two books with their succinct notes are as valuable and well done as is the *Commentary* itself, and together they provide a good basis for a study of the Indian Constitution.

The third work, *The Shorter Constitution of India*, is on a different scale. It is so to speak a ready reference work, and as such has its uses. While citation of authority is abundant, outside India the brevity of citation necessary to keep the book within reasonable compass makes it of less value. Nevertheless it is a book which will be of use to those interested in the broad scheme of things, though again compression makes it difficult reading. For the more serious student it has the advantage that it carries the law up to 1957 and thus serves as a skeleton extension of the major works and, it is to be hoped, will be a prelude to a full extension of them.

J. D. B. MITCHELL.

Studies in the Roman Law of Sale. Dedicated to the memory of Francis de Zulueta. Edited by David Daube. 1959. Oxford: at the Clarendon Press. £1 5s. net.

This volume of studies by scholars from British Universities (it is not quite accurate to say as does the publisher's note "teachers at universities in the United Kingdom," since one contributor, Dr. R. Yaron, though formerly a lecturer at Aberdeen University is now at the Hebrew University, Jerusalem) was originally intended to be presented to de Zulueta on his eightieth birthday but unfortunately owing to his death at the age of seventy-nine it has had to be produced as a memorial to him. As the learned editor points out, de Zulueta's death is only the last of a series of losses among the ranks of British Romanists since the war; but there is encouragement in the fact that it has been possible to produce in the present volume a worthy tribute to his fame and the editor is to be thanked for the notable service he has rendered to Roman law in this country by arranging for its production.

That the studies all deal with one topic, the law of Sale, is rather unusual in a work of this kind, though not unprecedented, but it lends it a welcome unity. The first is by A. M. Prichard, of Nottingham University, and concerns the problem of the gladiators in Gaius, *Institutes* 3, 146. He makes the interesting suggestion that the problem was probably purely academic for the Romans as the case in practice would be dealt with by mutual stipulations, but his discussion at times shows lack of attention to detail, *e.g.*, on p. 3 he finds it "rather odd" that Gaius (in 3, 146) mentions sale before hire, but this is the order Gaius uses in 3, 145. In his article on "Certainty of Price" examining the texts *Digest* 18.1.7.1; 37; 35.1; 7.2 and 19.1.13.24, the editor, Professor Daube of Oxford University, himself makes a substantial and distinguished contribution to the volume. His unorthodox conclusions, which are too long for reproduction, are summed up at pp. 44–45. The next article, by R. W. M. Dias of Cambridge University, turns from Roman to Roman-Dutch law, mainly with reference to South Africa. He discusses with copious references to the older literature and to the case law of South Africa and Ceylon the development of the doctrine of *laesio enormis* from its small beginnings in Code 4.44.2 to its final abolition (or apparent abolition, see pp. 61 *et seq.*) in South Africa in 1952, stressing the contribution of the Roman-Dutch lawyers to the structure raised on the small Roman foundation.

There follow notes by Professor P. W. Duff of Cambridge University on the interpretation of *Digest* 18.1.40 pr. and 72 pr. and "Sale of Wine," a short but penetrating discussion of *degustatio* by Dr. Yaron. Next comes a comparison between the Roman and English law on the seller's liability for eviction, written by Professor R. Powell of London University. Although comparisons such as are undertaken in this article, and in another later one by A. Rogerson of Oxford University on implied warranty against latent defects in Roman and English law, are not without interest and value it seems to the reviewer that they tend to lose more by a lack of depth resulting from the division of attention between the two systems than they gain from the comparison.

Between the above-mentioned articles come two on liability for defects in the things sold. The first, "*Dicta promissave*" by J. K. B. M. Nicholas of Oxford University, deals with *Digest* 21.1.1.1 and after suggesting emendation of the text goes on to express a well-founded doubt on whether there was in classical law, as is often assumed, a general liability at civil law for *dicta promissave* which was adopted into the Aedilitian Edict by reference. The second, by Professor P. G. Stein, of Aberdeen University, turns to a field of great historical importance and interest, particularly for Scots lawyers, namely the treatment of Roman law by the Glossators and Commentators. It illustrates some of the difficulties with which they were faced as a result of their unhistorical interpretation of the *Corpus juris civilis* and the modifications of Justinian's law to which this sometimes led. He does not, however, discuss the repercussions, if any, of their discussions on modern law. The history of the Aedilitian actions in Roman-Dutch law is the subject of an article by A. M. Honoré, of Oxford University. He holds that, although terminology became confused in the Byzantine period, there is nevertheless a continuity between these actions in classical law and in modern South African law (in which the Edict of the Aediles is recognised as in force except so far as changed or abrogated by custom), for in both systems damages in the Aedilitian action are confined to the value of the defective thing and do not extend to consequential loss as in the *actio empti*. Account, however, must now be taken of Professor Stein's observation (see pp. 103–104) that in classical law some jurists held that the damages even under the contractual action should in some cases be calculated by a *quanti minoris* method.

The last two articles, by Professor J. A. C. Thomas, of Glasgow University, and D. E. C. Yale, of Cambridge University, both deal with a much-discussed fragment of Celsus, *Digest* 12.4.16. Professor Thomas sides with those who hold that the text does not represent the whole of Celsus's discussion and makes the plausible suggestion that Celsus discussed a slave *suis nummis redemptus*, holding that there cannot be a sale unless, when there is an agreement that ownership should pass, it is a real ownership which passes to the buyer. As the "buyer" of a slave *suis nummis redemptus* is only a figurehead there was no sale. Mr. Yale on the other hand believes that Celsus was faced with a question of construction, namely whether, when I have given money with the object of getting a slave this amounts to an offer to buy or a gift of the money conditional on receiving a gift of the slave in return, the "seller" having the option of transferring the slave as seller or as donor. A major difficulty in this explanation, as Yale himself realises (see pp. 179–180 and 180 n. 1), is the word *proportione* in the text, a difficulty which is not really removed by reading as he does *pro portione* and translating it "as far as it goes" or in some such fashion. On his interpretation of the passage the transaction as far as it goes is either a gift or an offer to buy but not *emptio venditio*.

Prefaced to the volume is a list of the publications of de Zulueta and the laborious task of compiling indices of texts and of cases has not been shirked; but two small observations may be made. First, there is no indication in the book of the universities to which the contributors belong. Secondly, there seems to be no good reason why references to literature such as Buckland's *Textbook* should not be uniform throughout the volume.

W. M. GORDON.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly after going to press.)

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Printed in Great Britain by The Eastern Press, Ltd., London and Reading

THE JURIDICAL REVIEW

ST. ANDREWS
GLASGOW
ABERDEEN
EDINBURGH

The Law Journal of the Scottish Universities

1959 Part 1 — April

Edinburgh
W GREEN AND SON LIMITED
Law Publishers
Agents in America - THE CARSWELL CO. LTD., TORONTO

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(formerly *The Medico-Legal and Criminological Review*)

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The annual subscription is £1 1s. post free, but is included in the annual subscription of the Society which is £2 2s.

Published for the Society by Heffers, Petty Cury, Cambridge

1959

Printed in Great Britain by The Eastern Press, Ltd., London and Reading

R 29 SEP 1960

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